73-1233

No.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD AND PETER G. NASH, GENERAL COUNSEL, PETITIONERS

v.

SEARS, ROEBUCK AND CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

SEARS, ROEBUCK AND CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board and its General Counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the subject case.

OPINIONS BELOW

The order of the court of appeals (Pet. App. A, pp. 1a–2a) is not yet officially reported. The memorandum and order of the district court are reported at 346 F. Supp. 751 (Pet. App. C, pp. 4a–10a).

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1973 (Pet. App. A, p. 1a). The Board's

timely petition for rehearing *en banc* was denied on September 13, 1973 (Pet. App. B, p. 3a). On December 6, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to February 11, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Freedom of Information Act requires the disclosure of internal agency memoranda authorizing or refusing to authorize the prosecution of cases before the adjudicatory branch of the agency, and discussing the evidence and the legal theories upon which the prosecution should be based.

STATUTE INVOLVED

The relevant provisions of the Freedom of Information Act, as amended, 5 U.S.C. 552, are set out in Appendix D, pp. 11a–14a.

STATEMENT

A. THE PROCEDURE FOR PROCESSING UNFAIR LABOR PRACTICE CHARGES

Section 3(d) of the National Labor Relations Act, as amended (29 U.S.C. 153(d)), gives the General Counsel of the National Labor Relations Board "final authority on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10." The General Counsel has delegated the initial power to decide whether a complaint should issue on an unfair labor practice charge to the Board's 31 Regional Directors. N.L.R.B. Organization and Functions, Sec.

203.1, 32 F.R. 9588, 9589; N.L.R.B. Statements of Procedure, Sec. 101.4, 29 C.F.R. 101.4.

Upon the filing of a charge, an investigation is conducted by a member of the regional office staff. If the evidence satisfies the Regional Director that the charge is meritorious, he issues a complaint setting forth the acts alleged to constitute unfair labor practices. N.L.R.B. Statement of Procedures, Sec. 101.8, 29 C.F.R. 101.8; N.L.R.B. Rules and Regulations, Sec. 102.15, 29 C.F.R. 102.15. If the Regional Director concludes that the charge is without merit, he declines to issue a complaint, and so informs the parties by letter; it contains a brief statement of the reasons for the action, and advises the charging party of his right to appeal to the General Counsel. N.L.R.B. Statements of Procedure, Sec. 101.6, 29 C.F.R. 101.6; N.L.R.B. Rules and Regulations, Sec. 102.19, 29 C.F.R. 102.19.

In certain cases the Regional Director, before disposing of a charge, refers some or all of the issues presented to the General Counsel's Division of Advice in Washington, D.C. N.L.R.B. Statements of Procedure, Sec. 101.8, 29 C.F.R. 101.8. The Regional Director submits a case for advice if he believes that it presents novel or complex problems, or if it involves issues which the General Counsel has specified should be submitted in the interest of insuring the development of a uniform policy. The Regional Director transmits his request for advice by a memorandum, which details the facts discovered and the issues on which advice is sought.

Upon receipt of a request for advice, the Division of Advice considers the issues presented and sends a memorandum to the Regional Director (the "advice memorandum"). The memorandum may advise the Regional Director to dismiss the charge, to issue a complaint thereon, to proceed at his discretion, to seek a settlement, or to conduct a further investigation. The memorandum sets forth the reasons for the recommended action and, if it recommends issuance of a complaint, it may discuss possible factual and legal defenses, trial tactics, and the basis for settlement. Prior advice memoranda are not used as precedents, although they are occasionally referred to in an advice memorandum or attached thereto, in order to amplify the reasoning of the Division of Advice in the case under submission. See A. 194–196, 201, 211–227;[1] Quarterly Report on Case-Handling Developments, BNA, *Labor Relations Yearbook* (1968) 283–284.

Following receipt of the advice memorandum, the Regional Director disposes of the charge. While the Regional Director rarely, if ever, disregards advice on legal issues, he makes the ultimate decision whether to issue a complaint and in what form. The advice memorandum is not referred to either in the complaint or in any other communication which the Director may send to the parties.

Regardless of whether a case has been submitted to the Division of Advice, the Regional Director's decision not to issue an unfair labor practice complaint may be appealed to the General Counsel. N.L.R.B. Rules and Regulations, Sec. 102.19, 29 C.F.R. 102.19. The General Counsel's Office of Appeals reviews the entire file of the case in the light of the parties' written and oral presentations. N.L.R.B. Statements and Procedure, Sec. 101.6, 29 C.F.R. 101.6. See also Quarterly Report on Case-Handling Developments, BNA, *Labor Relations Yearbook* (1968) 294–295; A. 198–200. Based upon such consideration, the Office of Appeals may affirm the Regional Director's refusal to issue a complaint, in which case a letter will be sent to the parties stating the grounds of the affirmance. N.L.R.B. Rules and Regulations, Sec. 102.19(c), 29 C.F.R. 102.19(c); A. 228–232. If, however, the Office of Appeals concludes that further proceedings are warranted, it so notifies the parties by letter, and sends the Regional Director a memorandum (the "appeals memorandum").[2] This memorandum, like the comparable advice memorandum, sets forth the reasons why a complaint should issue, and often discusses matters related to its prosecution—*e.g.*, credibility of evidence, desirability of seeking further evidence, and legal arguments for reconciling the theory of the complaint with existing Board precedent. (A. 233–239.) Upon receipt of this memorandum, the Regional Director, unless there is a settlement, issues a complaint.

[1] "A." refers to the appendix in the court below. A copy is being filed with the Clerk.

[2] Prior to April 1971, such a memorandum was also prepared in cases where the Regional Director's refusal to issue a complaint was sustained.

B. THE PRESENT CASE

On April 6, 1971, Sears, Roebuck and Co. ("Sears") filed a charge with the Board's Regional office in Seattle, Washington, alleging that the Retail Clerks Union, Local No. 4, was violating Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. 158(b)(3), by refusing to bargain with Sears individually and insisting, instead, that Sears bargain in a multi-employer unit. After investigation, the Regional Director submitted the case to Washington for advice. Thereafter, by letters dated June 10 and July 26, the Regional Director notified Sears that he was refusing to issue a complaint on the charge because Sears' "attempted withdrawal from the [multi-employer association] was untimely, in that the investigation disclosed negotiations were already in progress at the time of the attempted withdrawal"; the Director cited several Board cases as authority for his decision (A. 24–25, 33–34). Sears appealed the Regional Director's decision to the General Counsel and, on August 20, the Acting General Counsel [3] reversed the Regional Director and ordered the issuance of a complaint. The Acting General Counsel ruled that the issue raised—whether a preliminary exchange of written proposals constituted a commencement of multi-employer negotiations—warranted Board determination (A. 42). An unfair labor practice complaint issued on September 1, 1971 (A. 44–48). That complaint is still pending.

[3] The Acting General Counsel at that time was Eugene G. Goslee. On August 24, 1971, Peter G. Nash assumed the duties of General Counsel (A. 49, 51).

Prior to appealing from the Regional Director's refusal to issue a complaint, Sears, relying on the Freedom of Information Act, requested the General Counsel to make available to it: (1) the memorandum prepared by the Division of Advice advising the Regional Director with respect to Sears' unfair labor practice case; (2) all advice and appeals memoranda for the past five years which involve issues similar to those in the instant case; and (3) any index or digest of advice and appeals memoranda (A. 26–29). That request, as amended to include documents explaining the advice and appeals memoranda (A. 35–38), was denied by the Acting General Counsel on the grounds, *inter alia*, that the materials were exempt from disclosure under Exemptions 5 and 7 of the Freedom of Information Act (A. 141–142, 147–149).

Sears then filed a complaint in the United States District Court for the District of Columbia under the Freedom of Information Act, seeking disclosure of the material (A. 5–14, 15–23). The General Counsel filed an answer requesting that the complaint be dismissed (A. 49–53) [4] and the parties filed cross-motions for summary judgment (A. 186–187).

The district court granted Sears' motion for summary judgment (Pet. App. C, pp. 4a–10a). It found

[4] On February 3, 1972, General Counsel Nash announced that, although the Freedom of Information Act did not require advice and appeals memoranda to be disclosed, he would voluntarily make such memoranda available in closed cases—*i.e.*, where appeal rights had been exhausted or a Board decision and order had issued—since such disclosure then would not interfere with the prosecution of cases (A. 54–55).

that advice memoranda are "instructions mandatory in substance if not in form," and thus constitute "instructions to staff that affect a member of the public" under the Freedom of Information Act, 5 U.S.C. 552(a)(2)(C) (Pet. App. C, p. 7a); that appeals memoranda are "final opinions" under that Act, 5 U.S.C. 552(a)(2)(A) (Pet. App. C, p. 9a); that neither were "intra-agency" memoranda within the meaning of Exemption 5, 5 U.S.C. 552(b)(5) (Pet. App. C, p. 8a–9a); and that documents incorporated by reference in advice and appeals memoranda, "though possibly qualified for a Sec. (b) exemption taken separately, * * * lost their exempt status by incorporation" (Pet. App. C, p. 8a).

The district court ordered the General Counsel: (1) promptly to make available to the public "all Appeals and Advice memoranda issued since July 4, 1967, and any document expressly incorporated therein by reference; (2) to "produce and compile," with reasonable promptness, "indices of said memoranda"; (3) to "produce explanatory material including existing documents in those instances where Advice or Appeals memoranda rely upon the 'circumstances of the case' or some other vague and imprecise reference * * * except where [the General Counsel] can demonstrate that these documents are exempt under the Act"; and (4) to "cease and desist from deleting from said Appeals and Advice materials the names of parties, the names of attorneys, citations to prior cases and all other information for which a justification for deletion has not been explained fully in writing except settlement suggestions from the Office of the General Counsel and the names of affiants" (Pet. App. C, pp. 9a–10a).

The court of appeals affirmed on the basis of the district court opinion. It also cited its recent opinion in another Freedom of Information Act case, *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board*. (Pet. App. A, p. 2a.)

REASONS FOR GRANTING THE WRIT

This case, and the court of appeals' prior decision in *Grumman, supra,* in which we intend to file a petition for a writ of certiorari shortly, present important issues involving the extent to which the Freedom of Information Act requires the disclosure of internal governmental memoranda which form the basis for governmental action and decision and which discuss and analyze the legal and factual theories upon which administrative litigation and proceedings are based. The decisions in this case and *Grumman,* by significantly and unwarrantedly limiting the scope of important exemptions to the Act, would seriously restrict the freedom of discussion and communication within the government which is essential to its effective functioning and which the exemptions were designed to protect.

1. The Freedom of Information Act, 5 U.S.C. 552, provides that government agencies shall make available to the public a broad spectrum of information, but exempts from its mandate certain specified categories of information. Exemption 5 excepts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law

to a party other than an agency in litigation with the agency" (5 U.S.C. 552(b)(5)). This exemption is designed to protect the efficiency of the government by permitting the "frank discussion of legal or policy matters" rather than forcing government agencies to "operate in a fishbowl" (S. Rep. No. 813, 89th Cong., 1st Sess. 9; see, also, H. Rep. No. 1497, 89th Cong., 2d Sess. 10).

In *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, this Court recognized that Exemption 5 was designed to incorporate the pre-existing privilege against the disclosure of intra-governmental documents when such disclosure would be injurious to the consultative functions of government. *Id.* at 87. It accordingly distinguished between "materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." *Id.* at 89. The former are protected against disclosure under the fifth exemption, while purely factual material contained in intra-agency memoranda, if severable without compromising the remainder of the contents, are subject to disclosure.

The advice and appeals memoranda here involved discuss the legal and policy considerations favoring, or militating against, the prosecution of a particular case; the sufficiency of the evidence uncovered in the investigation; and, if prosecution be recommended, the scope and legal theory of the complaint, trial tactics, and acceptable settlement terms. They reflect the views of the General Counsel on whether the case warrants prosecution, and guide the Regional Director in taking further action, *e.g.*, issuing a complaint and prosecuting it before the Board. For these reasons, and since the Regional Director's ultimate decision and the reasons therefor are fully communicated to the parties either through the complaint which he issues or the letter which he sends explaining his refusal to proceed, advice and appeals memoranda are not subject to discovery in litigation against the agency. *Davis* v. *Braswell Motor Freight Lines, Inc.*, 363 F. 2d 600, 603–605 (C.A. 5). They are accordingly protected against disclosure under Exemption 5 as interpreted in *Mink, supra.*

Contrary to the interpretation of Exemption 5 announced in *Mink*, the courts below concluded that Exemption 5 applied only to memoranda which reflect "a preliminary view or a record of advocacy and debate" (Pet. App. C, p. 8a). Thus, rather than protecting the entire "open, frank discussion between subordinate and chief concerning administrative action" (Reed, J. in *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 946 (Ct. Cls.), quoted with approval in *Mink, supra*, 410 U.S. at 87), the exemption as interpreted by the courts below protests only that portion of the discussion in which the subordinate presents his views. Although the fifth exemption is to be limited "as narrowly as consistent with efficient Government operation," S. Rep. No. 813, *supra*, at 9, the restrictive reading of the courts below goes further, and limits the exemption in a manner which severely hampers such operations by impeding the free flow of directions and advice from agency superiors to their subordinates in implementing agency objectives.

2. The Freedom of Information Act contains two

other exemptions from compulsory disclosure which also apply to the advice and appeals memoranda.

(a) Exemption 7 covers "investigatory files compiled for law enforcement purposes except to the extent available by law to a [private] party" (5 U.S.C. 552(b)(7)). The exemption "covers investigatory files related to enforcement of * * * labor and securities laws as well as criminal laws" (H. Rep. No. 1497, *supra*, at 11).[5] It rests on the premise that the "disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court" (S. Rep. No. 813, *supra*, at 9).

Advice and appeals memoranda are prepared as part of the General Counsel's investigation into whether an unfair labor practice case should be prosecuted before the Board (and, if necessary, the courts), and constitute part of the investigatory file. These memoranda often contain discussions of trial strategy, possible defenses, and evaluations of the testimony of prospective witnesses, so that their disclosure while the case is pending could well impede its effective prosecution. Moreover, since the decision below requires the production of "explanatory material including existing documents in those instances where Advice or Appeals memoranda rely upon the 'circumstances of the case' or some other vague and imprecise reference" (Pet. App. C, p. 10a), it would

[5] See *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591 (D.P.R.); *Clement Bros.* v. *National Labor Relations Board*, 282 F. Supp. 540 (N.D. Ga.), affirmed, 407 F. 2d 1027 (C.A. 5); *Frankel* v. *Securities and Exchange Commission*, 460 F. 2d 813, 817 (C.A. 2).

cause the agency's investigatory files to be opened still further, thereby enhancing the risk of hampering prosecution of the case. For these reasons, appeals and advice memoranda and other documents in the agency's investigatory files are not ordinarily available by law to a private party;[6] they are thus within the seventh exemption from compulsory disclosure under the Freedom of Information Act.

(b) Although the Government did not rely upon Exemption 2, that exemption also covers these memoranda. It applies to matters that are "related solely to the internal personnel rules and practices of an agency" (5 U.S.C. 552(b)(2)). The House Report indicates that under this exemption "operating rules, guidelines and manuals of procedure for Government investigators or examiners would be exempt from disclosure" (H. Rep. No. 1497, *supra*, at 10). The Senate Report, however, indicates that it "relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like" (S. Rep. No. 813, *supra*, at 8).

The examples cited in the Senate Report were illus-

[6] See *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854, 857–859 (C.A. 2); *Rutter-Rex Co., Inc.* v. *National Labor Relations Board*, 473 F. 2d 223, 231–234 (C.A. 5), certiorari denied, No. 72–1501, October 9, 1973. However, under the Board's "Jencks rule," 29 C.F.R. 102.118(b), a witness' pre-trial statements are made available after the witness has been called to testify. The legislative history of Exemption 7 indicates that Congress did not intend to make these statements available any earlier. 110 Cong. Rec. (daily ed.) 1779–1780 (July 31, 1964).

memoranda were documents required by 5 U.S.C. 552(a)(2) to be made publicly available and indexed.

For the reasons we have outlined, we submit that the advice and appeals memoranda are exempt from the requirements of the Freedom of Information Act. There is therefore no need for this Court to consider whether, if those exemptions do not apply, the documents are required to be published and indexed by 5 U.S.C. 552(a)(2). We nevertheless contend that the courts below were wrong in so categorizing them.

Section (a)(2) of the Act applies, *inter alia,* to all "final opinions; including concurring and dissenting opinions, as well as orders made in the adjudication of cases" (5 U.S.C. 552(a)(2)(A)), and to "administrative staff manuals and instructions to staff that affect a member of the public" (5 U.S.C. 552(a)(2)(C)). The courts below concluded that advice memoranda were "instructions to staff that affect a member of the public," and hence that Section (a)(2)(C) required their disclosure (Pet. App. C, p. 7a). However, by its terms that provision requires disclosure only of "*administrative* staff manuals and instructions" (emphasis added). The prefix "administrative," which modifies both manuals and instructions, indicates that Congress intended to cover only manuals and instructions which deal with procedural or other administrative matters, and not discussions of specific cases which are being considered for possible prosecution.

The legislative history confirms this conclusion. The Senate Report, in explaining the word "administrative," stated (S. Rep. No. 813, *supra,* at 2):

trative and not exclusive, and the two reports are not necessarily inconsistent. Indeed, since the House considered the bill which became the Freedom of Information Act after it passed the Senate, and did not change the language of Exemption 2, the House evidently believed its interpretation of Exemption 2 was consistent with that of the Senate expressed in the Senate Report.[7]

We submit that the memoranda here consist of guidelines for agency personnel which, consistent with the House Report, should be considered to be exempt from disclosure under the second exemption.[7] They are similar to the documents referred to in that report, and are no less entitled to protection. See *Polymers, Inc.* v. *National Labor Relations Board,* 414 F. 2d 999, 1006 (C.A. 2), certiorari denied, 396 U.S. 1010, cf. *Cuneo* v. *Schlesinger,* 484 F. 2d 1086 (C.A.D.C.).

3. The Freedom of Information Act divides agency documents into three categories: some must be published in the Federal Register (5 U.S.C. 552(a)(1)); others must be published or made publicly available, and indexed (5 U.S.C. 552(a)(2)); all other documents must be made available on request (5 U.S.C. 552(a)(3)). As we have indicated, the Act then defines nine categories of documents which are totally exempt from its requirements (5 U.S.C. 552(b)). The lower courts held that the advice and appeals

[7] *Stokes* v. *Brennan,* 476 F. 2d 699 (C.A. 5) and *Hawkes* v. *Internal Revenue Service,* 467 F. 2d 787 (C.A. 6), are, we believe, incorrect in concluding that the Senate and House Reports are inconsistent, and that the Senate report reflects a congressional intent that only documents relating to an agency's relations with its employees may be considered to be within the exception.

> The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action.

Similarly, the House Report stated (H. Rep. No. 1497, *supra*, at 7–8):

> [A]n agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff * * * in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases.[8]

The courts below also erred in concluding that appeals memoranda are "final opinions" within the meaning of Section (a)(2)(A) (Pet. App. C, p. 9a). Appeals memoranda are issued only in cases where an appeal is sustained and prosecution of the case is to be undertaken (*supra*, p. 5). Accordingly, far from constituting the agency's final action in the case, these memoranda always trigger further proceedings in the case.

In any event, they are not opinions "made in the adjudication of cases." The General Counsel adjudicates no cases; he simply decides whether to initiate them.

[8] Cf. *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 795 (C.A. 6) (the term "administrative" was inserted in Section 552(a)(2)(C) "to bar disclosure of information which, if known to the public, would significantly impede the enforcement process").

The courts' conclusion that the advice and appeals memoranda must be indexed was based upon its incorrect determination that they were instructions to staff and final opinions within Section (a)(2) of the Act. If, as we contend, they are exempt from disclosure under Section (b) of the Act or not covered by Section (a)(2), it follows that they need not be indexed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
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FEBRUARY 1974.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 72-1870

[No Opinion]

September Term, 1972

Civil Action No. 1571-71

SEARS, ROEBUCK & CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT

v.

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL, ON HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD, APPELLANTS

(Filed July 27, 1973)

Appeal from the United States District Court for the District of Columbia.

Before WILBUR K. MILLER, Senior Circuit Judge, and WRIGHT and ROBB, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an

opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from herein is hereby affirmed on the basis of the opinion of District Judge Howard F. Corcoran, *see Sears, Roebuck & Co.* v. *NLRB*, D. D.C., 346 F.Supp. 751 (1972). *See also Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, —— U.S. App. D.C. ——, —— F.2d —— (No. 71-1730, decided July 3, 1973).

It is FURTHER ORDERED by this court that the stay ordered by the District Court is hereby dissolved.

Per Curiam.

For the Court:

HUGH E. KLINE,

Clerk.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 72-1870

September Term, 1973

Civil Action 1571-71

SEARS, ROEBUCK AND CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT

v.

NATIONAL LABOR RELATIONS BOARD, AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL ON HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD, APPELLANTS

(Filed September 13, 1973)

Before: WILBUR K. MILLER, Senior Circuit Judge; WRIGHT and ROBB, Circuit Judges

ORDER

On consideration of appellants' petition for rehearing, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam.

For the Court:

HUGH E. KLINE,

Clerk.

APPENDIX C

United States District Court for the District of Columbia

Civil Action No. 1571–71

SEARS, ROEBUCK AND CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT, PLAINTIFF

v.

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL, IN HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD, DEFENDANTS

(Filed August 10, 1972)

MEMORANDUM AND ORDER

This cause is before the Court on cross motions for summary judgment.

Plaintiff[1] Sears, Roebuck and Co. (hereinafter Sears) is a "charging party" before the National Labor Relations Board, (Board Case No. 19–CB–1673), and seeks access, pursuant to the Freedom of Information Act (hereinafter the Act), 5 U.S.C. § 552, to certain documents issued by the Office of the

[1] Plaintiff argues that it is a proper class representative that may therefore seek relief on behalf of a class of charging parties before the National Labor Relations Board. Since whatever relief this Court chooses to grant the plaintiff will necessarily be binding on the defendants as to all persons, the Court need not and does not address this issue.

General Counsel of the Board, commonly referred to as Advice and Appeals memoranda, and certain other materials incorporated by reference therein.

The Act grants this Court jurisdiction "to enjoin the defendants from withholding agency records" prospectively in addition to "order[ing] the production of any Agency records improperly withheld" from a complainant. 5 U.S.C. § 552(a)(3).

Defendants have historically maintained a uniform policy of withholding the sought-after documents, and, although a portion of the memoranda have been made available by defendants to the public during the pendency of this case,[2] the defendants maintain that this revelation reflects a voluntary change of policy and is not required by the Act. Defendants also refuse to make available documents incorporated by reference in said memoranda, and have deleted from the documents made available such matter as the names of parties, the names of attorneys and citations to prior Advice and Appeals memoranda.

The controversy giving birth to this action[3] arose between the plaintiff and the Retail Clerk's International Union (hereinafter "Union") in April, 1971. The plaintiff charged the Union with violating Section 8(b)(3) of the National Labor Relations Act (hereinafter, N.L.R.A.). As required by N.L.R.A. plaintiff

[2] On February 3, 1972, the General Counsel announced that, while he still considered the Advice and Appeals memoranda protected by the Freedom of Information Act, he would make available all Advice and Appeals memoranda when the case involved was completed.

[3] In related proceedings this Court issued a preliminary injunction on March 17, 1972 staying proceedings in Board Case No. 19–CB–1673 until records which the Board made available to the plaintiff (only after substantial delay) could be examined by the plaintiff for use in that case before the Board.

Sears filed its charge with the Regional Director of the Nineteenth Region of the National Labor Relations Board in Butte, Montana, (hereinafter, Regional Director). The objective of the plaintiff in bringing its charge to the Regional Director was to obtain the issuance of a complaint against the Union.

Under the provisions of the N.L.R.A. the final authority to issue such a complaint is vested in the office of the Board's General Counsel 29 U.S.C. § 153(d).[4] The General Counsel has in turn delegated the initial power to determine whether a complaint should be issued to the Regional Directors. National Labor Relations Board, Organization and Functions, Section 203.1, 32 F.R. 9588. Board Statements of Procedure, Sec. 101.4, 29 C.F.R. Sec. 101.4.

To promote uniformity in the administration of the Act, the General Counsel required that Regional Directors when faced with requests that raise "novel" problems, submit a description of the request to the General Counsel's Office in Washington for "Advice" as to disposition. Statements of Procedure Sec. 101.8. The ostensible purpose behind this procedure is to insure that new questions arising in the field of labor relations be handled in substantially the same manner in all parts of the country. In this way Advice memoranda are issued in all the novel and significant cases brought by charging parties. After extensive centralized consideration the Advice Branch of the Office of the General Counsel issues these memoranda containing its final conclusions to the regional directors, who regularly implement these memoranda by issuing or refusing to issue complaints as "advised" by the Advice Branch.

[4] The General Counsel concedes that in the performance of his pre-complaint prosecutorial authority, he is clearly an agency within the meaning of 5 U.S.C. § 551(1).

Defendants claim that these memoranda include a diversity of information including settlement suggestions. However, careful examination of the procedure reveals that the net effect of an Advice memorandum is to truncate the delegated authority of a Regional Director to the point where his issuance of a complaint or refusal to do so is merely a ministerial function. Far from being recommendations, although ancillary recommendations may be contained therein, Advice memoranda are instructions mandatory in substance if not in form. As such, they constitute "instructions to Staff that affect a member of the public." 5 U.S.C. § 552(a)(2)(c).

When a regional director fails to issue a complaint, either pursuant to the recommendation of the Advice Branch, or independently in a case not referred to the Advice Branch, the charging party may move the Office of the General Counsel to reconsider the decision by seeking relief from the Office of Appeals. Statements of Procedure, Sec. 101.6. The conclusions of the Office of Appeals have traditionally been summarized in memoranda called the "General Counsel's Minute." Plaintiff does not seek access to these documents.

Thereafter the General Counsel either sustains the refusal to proceed or orders the Regional Director to issue the complaint. Additionally the Office of Appeals prepares a second memorandum—the "agenda minute"—which provides an analysis of the decision and which is sent to the Regional Director. It is access to this second group of appeals memoranda that plaintiff seeks.

Letters containing only the result, though not necessarily the underlying rationale, were sent to the parties previously in this action. During the pendency of this action a new policy has been instituted by the Gen-

eral Counsel whereby a portion of the information found previously only in the agenda minutes is included in these letters.

The Action of the General Counsel's office on appeals of the refusal of Regional Directors to issue complaints, whether made pursuant to "advice" from the Counsel office or otherwise is clearly final. This is not a preliminary view or a record of advocacy and debate, it is a final determination of the General Counsel's staff of the disposition of a charge. It is not an expression of a point of view, it is the disposition of a charge. As such the Appeals memorandum lies outside the Act's §(b)(5) exemption. Congress intended by that exemption only to promote the "free flow of information" *Ackerly* v. *Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969), and did not "design [it] to facilitate the easy exchange of substantive declarations of policy. Indeed if it were, the exemption would have clearly engulfed the rule." *Sterling Drug* v. *F.T.C.*, 450 F.2d 698, 713 (D.C. Cir. 1971) Bazelon J. dissenting in part. *See also*, Davis, "The Information Act: A Preliminary Analysis," 34 Chicago Law Rev. 761. Since the memoranda lie outside the exemption, they *must* be disclosed. *Tennessean Newspapers* v. *F.H.A.* —— F.2d —— (6th Cir., May 4, 1972); *Getman* v. *N.L.R.B.*, 450 F.2d 670, 672 (D.C. Cir. 1971).

It follows, further, that documents incorporated by reference in Advice and Appeals memoranda, even though possibly qualified for a Sec. (b) exemption taken separately, must also be disclosed, since they have lost their exempt status by incorporation. *American Mail Line Ltd.* v. *Gulick*, 411 F.2d 696, 703 (D.C. Cir. 1968).

Upon consideration of the undisputed facts and after examining examples of the requested memoranda, this Court concludes: (a) that the Advice and

Appeals memoranda are not "intra-agency memorandums" within the meaning of §.552(b)(5) of the Act; (b) that the Advice memoranda are "instructions" which affect a member of the public within the meaning of the Act; (c) that the Appeals memoranda issued in cases still pending, including those issued in Board Case No. 19–CB–1673, are "final opinions" within the meaning of the Act; (d) that documents expressly incorporated by reference are in fact part of said memoranda; (e) that in cases where the aforesaid memoranda rely upon and make reference to the "circumstances of the case" without delineating these "circumstances" the General Counsel must produce explanatory material including documents unless the General Counsel demonstrates such documents to be exempt; (f) that the Advice and Appeals memoranda made available shall include the names of the parties, the names of the attorneys, citations to prior cases and all other information for which justification for deletion has not been explained fully in writing except the names of affiants, and settlement suggestions from the Office of the General Counsel to the regional directors; and (g) that, the Act requires that the Advice and Appeals memoranda issued since July 4, 1967 be indexed and such indices be made available to the public.

Accordingly, the Court concludes that the plaintiff's motion for summary judgment should be granted and the defendant's motion for summary judgment be denied. It is *so ordered* and further *ordered* that—

(1) that defendants promptly make available to the public all Appeals and Advice memoranda issued since July 4, 1967, and any document expressly incorporated therein by reference;

(2) that defendants with reasonable promptness produce and compile, if necessary, indices of said memoranda;

(3) that defendants produce explanatory material including existing documents in those instances where Advice or Appeals memoranda rely upon the "circumstances of the case" or some other vague and imprecise reference without delineating what those circumstances are except where they can demonstrate that these documents are exempt under the Act;

(4) that defendants cease and desist from deleting from said Appeals and Advice materials the names of parties, the names of attorneys, citations to prior cases and all other information for which a justification for deletion has not been explained fully in writing except settlement suggestions from the Office of the General Counsel and the names of affiants.

H. F. CORCORAN,
Judge.

Dated: August 10, 1972.

APPENDIX D

The provisions of the Freedom of Information Act, as amended (5 U.S.C. 552) are as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedures, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may

not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance, with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from with holding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1233

NATIONAL LABOR RELATIONS BOARD and
PETER G. NASH, GENERAL COUNSEL,
Petitioners

—v.—

SEARS, ROEBUCK AND COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 11, 1974
CERTIORARI GRANTED MAY 28, 1974

Supreme Court of the United States

OCTOBER TERM, 1973

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NATIONAL LABOR RELATIONS BOARD and
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(The Memorandum and Order of the District Court, the Judgment of the Court of Appeals affirming the District Court, and the Order of the Court of Appeals denying Appellants' petition for rehearing were printed in the appendix to the petition for certiorari; and the 1961 Statement on "Operations of the Office of NLRB General Counsel" is printed in the appendix to the brief in opposition to the petition. These documents are not reprinted in this appendix.)

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Case No. 1571-71

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

8. 4.71	Complaint filed
10.14.71	Amended complaint filed
2. 4.72	Defendants' answer to amended complaint filed
2.11.72	Plaintiff's motion for preliminary injunction filed
2.18.72	Defendants' opposition to motion for preliminary injunction filed
3.17.72	Motion for preliminary injunction argued and granted
3.27.72	Findings of fact and conclusions of law and Order granting preliminary injunction entered
3.30.72	Defendants' request for stay of injunction pending appeal filed
3.30.72	Notice of appeal from Order of 3-27-72 filed
4. 6.72	Plaintiff's opposition to defendants' request for stay filed
4.23.72	Plaintiff's motion for summary judgment filed
6.21.72	Defendants' opposition and cross-motion for summary judgment filed
6.26.72	Plaintiff's opposition to cross-motion filed
7.17.72	Order denying stay of injunction entered
7.28.72	Motion and cross-motion for summary judgment argued
8.10.72	Memorandum and order granting plaintiff's motion for summary judgment and denying defendants' cross-motion entered
8.16.72	Notice of appeal from Order of 8-10-72 filed

Case No. 72-1870

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

9.18.72 Certified original record filed

5.29.73 Per curiam Order by the Clerk for the Court, *sua sponte* placing case on summary calendar

6.18.73 Argument held before Wilbur K. Miller, Sr. Circuit Judge, Wright and Robb, Circuit Judges

7.27.73 Judgment issued affirming judgment of the District Court on the basis of the opinion of District Judge Corcoran; stay ordered by District Court dissolved

8.10.73 Petition for rehearing and suggestion for rehearing *en banc* filed

8.14.73 Appellants' motion for stay of Order of July 27, 1973, filed

8.24.73 Per Curiam Order issued granting appellants' motion for stay of Order of July 27, 1973

9.13.73 Per Curiam Order issued denying petition for rehearing

9.13.73 Court's letter to parties advising that no judge requested a vote on suggestion for rehearing *en banc* and that no action was taken on said petition

9.20.73 Appellants' motion for stay of judgment pending filing of petition for certiorari filed

10.16.73 Per Curiam Order issued granting motion for stay of judgment

11.13.73 Per Curiam Order issued granting General Counsel's motion to substitute Peter G. Nash as a defendant-appellant for Eugene G. Goslee

11.20.73 Appellants' motion to extend stay of judgment filed

1. 4.74 Per Curiam Order staying effectiveness of judgment, issued

* * * *

2.11.74 Petition for writ of certiorari filed in the Supreme Court

5.28.74 Order of the Supreme Court granting petition for certiorari issued

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1571-71

SEARS, ROEBUCK AND CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act,

925 South Homan Avenue
Chicago, Illinois 60607
312-265-5352

PLAINTIFF

v.

THE NATIONAL LABOR RELATIONS BOARD and EUGENE G. GOSLEE, Acting General Counsel, on his own behalf and as agent for the NATIONAL LABOR RELATIONS BOARD,

1717 Pennsylvania Avenue, N.W.
Washington, D. C.
393-3111

DEFENDANTS

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

SEARS, ROEBUCK AND CO., plaintiff, by its attorneys, Alan Raywid, Lawrence M. Cohen and Gerard C. Smetana, for its complaint against the NATIONAL LABOR RELATIONS BOARD and EUGENE G. GOSLEE, Acting General Counsel, on his own behalf and as agent for the NATIONAL LABOR RELATIONS BOARD, defendants, alleges as follows:

1. This action arises under the Freedom of Information Act, 5 U.S.C. 552, as here after more fully appears.

2. This Court has original jurisdiction of this action under 5 U.S.C. 552(a)(3); 28 U.S.C. 1337; the All Writs Act, 28 U.S.C. 1651; 5 U.S.C. 703; and the Federal Declaratory Judgment Act, as amended, 28 U.S.C. 2201-02.

3. Plaintiff brings this action on its own behalf and on behalf of other persons similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class which plaintiff represents is so numerous that joinder of all members is impracticable. It is composed of all persons, such as plaintiff, who have been denied and continue to be denied by defendants access to the records of the National Labor Relations Board, hereafter described, notwithstanding that such records constitute precisely the kinds of "final opinions, statements of policy and interpretations" and "instructions to staff that affect a member of the public" which the Freedom of Information Act (5 U.S.C. Sec. 552(a)(2)(A)(B) and (C)) requires defendants to index and make available to the public. In view of defendants' uniform and consistent refusal to make said records available to both plaintiff and the public, a common question of law and fact is raised in this proceeding affecting the rights of all members of the class who are, and continue to be, adversely affected by the practice complained of herein. Further, defendants' actions with respect to plaintiff, as hereafter described, were predicated on grounds generally applied to all members of the class, thereby making appropriate final injunctive relief with respect to the class as a whole. As a member of said class, plaintiff will fairly and adequately protect the interests of the class in this proceeding.

4. Plaintiff is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

5. Defendant National Labor Relations Board (hereafter "Board") is an independent Federal agency created and existing under the National Labor Relations Act, as amended, 29 U.S.C. 141, *et seq.* (hereafter "Labor Act"), with its principal offices in Washington, D.C.

6. Defendant Eugene G. Goslee (hereafter "Goslee") was at all times material herein, specifically during the period from June 25, 1971 to and including August 24, 1971, the Acting General Counsel of the National Labor Relations Board, an office created by and existing under

Section 3(d) of the Labor Act, with principal offices in Washington, D.C., and as such was empowered, on the Board's behalf, to issue or refrain from issuing unfair labor practice complaints under Section 10 of the Labor Act (a power which has been delegated to the Board's Regional Directors, see Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.15) and, pursuant to Section 102.117(c) of the Board's Rules and Regulations, series 8, as amended, 29 C.F.R. 102.117(c), to receive and answer requests for agency records.

7. Arnold Ordman (hereafter "Ordman") was from 1963 to and including June 25, 1971 and Peter C. Nash (hereafter "Nash") is and has been subsequent to and including August 24, 1971 the General Counsel of the Board with the same powers and duties as described in paragraph 6 above. The past practice of Ordman and the present practice of Nash, with respect to the disclosure of the agency records here involved, has been and is the same as that of Goslee as hereafter described.

8. The Regional Advice Branch of the Office of the General Counsel of the Board (hereafter "Advice Branch") is located in Washington, D.C. It has responsibility, under the supervision of the Board's General Counsel, to review requests by the Board's Regional Directors for advice and to formulate policy on novel or unsettled procedural and substantive matters arising in unfair labor practice cases. Section 201.1.1 of the Board's Statements of Procedure, series 8, as amended, 32 C.F.R. 9588. In this capacity, the Advice Branch issues mandatory instructions to said Regional Directors with respect to the disposition of unfair labor practice charges and the issuance of unfair labor practice complaints. Said mandatory instruction, along with the precedence, theories and analyses in support thereof and occasional references to relevant prior Advice determination, are communicated to the Regional Directors by means of a memorandum (hereafter "Advice Memorandum").

9. The Office of Appeals of the Office of the General Counsel of the Board (hereafter "Office of Appeals") is located in Washington, D.C. It has responsibility to review appeals from the refusal of a Regional Director to issue an unfair labor practice complaint and, under the supervision of the Board's General Counsel, to sustain or reverse said refusal. Section 202.1.2 of the Board's Statements of Procedure, series 8, as amended, 32 C.F.R. 9588; Section 102.19 of the Board's Rules and Regulations, series 8, as amended, 29 C.F.R. 102.19. Said determination of the Office of Appeals, along with the precedence, theories and analyses in support thereof and occasional references to releavnt prior Appeals determination, are communicated to the Regional Directors by means of a memorandum (hereafter "Appeals Memorandum").

10. It has been the uniform and consistent practice of the defendants, as well as Ordman and Nash, to refuse to make available to the public Advice and Appeals Memoranda, and indices thereof, on the ground that such records are not subject to disclosure under the Freedom of Information Act. Report of Committee on Practice and Procedure under the National Labor Relations Act, American Bar Association Section of Labor Relations Law, Vol. II, 1971 (hereafter "1971 Report"), pp. 233-237, 242-246; Report of Committee on Practice and Procedure Under the National Labor Relations Act, American Bar Association Section of Labor Relations Law, Vol. II, 1970 (hereafter "1970 Report"), pp. 5-10. This position has been maintained despite the contrary position adopted by the American Bar Association Section of Labor Relations Law. 1971 Report, pp. 233-237, 242-6; 1970 Report, pp. 5-10. The events described in paragraph 11-14 *infra*, involving plaintiff, are illustrative and typical of said practice of refusing to make available Advice and Appeals Memorandum and indices thereof. A similar result would have occurred if any other member of the class which plaintiff here represents had made requests of defendant such as those of plaintiff described in paragraphs 11 and 13 *infra*. Said requests would also have been denied, as were plaintiff's as described in paragraphs 12 and 14 *infra*.

11. On or about June 10, 1971, pursuant to mandatory instructions received from the Advice Branch in an

Advice Memoranda, the Regional Director for the Nineteenth Region of the Board informed plaintiff that he was refusing to issue a complaint with respect to the unfair labor practice charges filed by plaintiff in Board Case No. 19-CB-1673. A copy of said letter is attached hereto and made a part hereof as Exhibit "A". On or about July 14, 1971, plaintiff, in order to perfect its right to appeal said determination to the Office of Appeals and acting under the Freedom of Information Act and in compliance with the applicable Board rules, filed a Request for Information (hereafter "Request") with defendant Board through defendant Goslee. In said Request, plaintiff requested that the Board, in accord with the Freedom of Information Act, make available for public inspection and/or copying the Advice Memorandum in Case No. 19-CB-1673, other relevant Advice and Appeals memoranda, and the indices thereof, all as more fully described in the Request which is attached hereto and made a part hereof as Exhibit "B".

12. On or about July 22, 1971, Goslee, on behalf of the Board and pursuant to the practice described in paragraph 10 above, by teletype to plaintiff as confirmed by a letter of explanation dated the next day, refused to make available to plaintiff any of the information sought in its Request. A copy of said teletype and letter are attached hereto and made a part hereof as Exhibits "C" and "D", respectively.

13. On or about July 28, 1971, plaintiff was informed in greater detail by the Regional Director for the Nineteenth Region of his reasons for refusing to issue complaint but said letter also failed to make aavilable to plaintiff the information sought in its Request. A copy of said letter is attached hereto and made a part hereto as Exhibit "E". On or about July 29, 1971, plaintiff, again in order to perfect its right to appeal said determination to the Office of Appeals and acting under the Freedom of Information Act and in compliance with the applicable Board rules, filed a Renewed Request for Information (hereafter "Renewed Request") with defendant Board through defendant Goslee. In said Renewed Request, plaintiff repeated its Request to the Board in

accord with the Freedom of Information Act, clarified where necessary its Request, and answered each of the reasons Goslee had proferred for denying the Request, all as more fully described in the Renewed Request attached hereto and made a part hereof as Exhibit "F".

14. On or about August 4, 1971, Goslee, on behalf of the Board and pursuant to the practice described in paragraph 10 above, by letter to plaintiff, refused to make available to plaintiff any of the information sought in the Renewed Request. A copy of said letter is attached hereto and made a part hereof as Exhibit "G". In order to comply with the applicable time requirements and expressly reserving its rights involved herein, plaintiff under protest then timely filed its appeal in Case No. 19-CB-1673 with the Office of Appeals. Although plaintiff's appeal was thereafter sustained and complaint in Case No. 19-CB-1673 issued, neither said determination of the Office of Appeals nor said complaint, which are attached hereto and made a part hereof as Exhibits "H" and "I", respectively, made available to plaintiff the information sought in its Request and Renewed Request and nor, to date, has such information been made available to plaintiff in any other manner by Goslee, Nash or any other agent of the Board.

15. The practice of the defendants as described in paragraph 10 above, as applied to plaintiff by denying its Request and Renewed Request as described in paragraphs 12 and 14 above, has deprived and continues to deprive plaintiff and the class it represents of necessary and valuable rights in violation of the Freedom of Information Act. They have been and are being denied their right to Advice and Appeals Memoranda and indices thereof and by such denial are being preluded, *inter alia*, from ascertaining the policies and law that are being adhered to by the General Counsel of the Board.

16. There is no remedy other than by this action by which plaintiff and the class it represents can receive just and equitable relief and prevent defendants from continuing to deprive them of information to which they are entitled under the Freedom of Information Act. The foregoing allegations thus set forth an actual controversy

and are matters of public interest, which a declaratory judgment construing the applicability of the Freedom of Information Act in the circumstances here involved will settle and terminate.

WHEREFORE, plaintiff prays this Court to enter a decree which:

(a) Declares that the failure of defendants to provide plaintiff and the class it represents with Advice and Appeals Memoranda and indices thereof, such as requested in plaintiff's Request and Renewed Request, deprives plaintiff and the class it represents of necessary and valuable statutory rights in violation of the Freedom of Information Act.

(b) Grants plaintiff and the class it represents a permanent injunction enjoining the defendants, their employees, agents, servants, officers, and attorneys from continuing to abridge their rights by refusing to supply plaintiff and the class it represents with Advice and Appeals Memoranda and indices thereof such as requested in plaintiff's Request and Renewed Request.

(c) Grants plaintiff and the class it represents such other and further relief as is deemed to be just and equitable in the premises.

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EXHIBIT "A"

NATIONAL LABOR RELATIONS BOARD

REGION 19

[Logo]

1000 Republic Building, 1511 Third Avenue
Seattle, Washington 98101
June 10, 1971 Telephone (206) 442-4532

Philip C. Lederer, Attorney at Law
111 W. Washington Street
Chicago, Illinois 60602

Re: Retail Clerks Union Local No. 4
Case No. 19-CB-1673

Dear Mr. Lederer:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

The investigation discloses that the Employer's attempted withdrawal from the Silver Bow Employers Association was untimely, in that the investigation disclosed negotiations were already in progress at the time of the attempted withdrawal. Accordingly, further proceedings are not warranted and I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D. C. 20570 and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on June 23, 1971. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

/s/ Charles M. Henderson
CHARLES M. HENDERSON
Regional Director

Encls.

CERTIFIED MAIL NO. 909905
RETURN RECEIPT REQUESTED

cc: General Counsel, National Labor Relations Board, Washington, D.C. 20570
Retail Clerks Union Local No. 4, 125 W. Granite, Butte, MT 59701
Sears, Roebuck and Co., 32 E. Granite Street, Butte, MT 59701
Retail Clerks International Association, 2819 First Ave., Seattle, WA 98121

EXHIBIT "B"

July 14, 1971

Mr. Eugene G. Goslee
Acting General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Re: Retail Clerks Union, Local No. 4,
Retail Clerks International Association,
AFL-CIO, (Sears, Roebuck and Co.),
Case No. 19-CB-1673

Dear Mr. Goslee:

By letter dated June 10, 1971, a copy of which was sent to you, the Nineteenth Region of the Board refused to issue a complaint in the above-captioned case. Accordingly, the charge filed by our client, Sears, Roebuck and Co., was dismissed. The only basis for this decision disclosed in said letter, or at any time, was that "the Employer's attempted withdrawal from the Silver Bow Employers Association was untimely, in that . . . negotiations were already in progress at the time of the attempted withdrawal." Sears, as the charging party, has never been informed of either the factual or legal basis for this conclusion of the Nineteenth Region. We have been advised, however, that the decision of the Region was predicated on mandatory instructions contained in a memorandum received from the Advice Branch of the Board.

Pursuant to Section 102.19 of the Board's Rules and Regulations, we intend to seek review of the refusal to issue complaint in this matter by filing an appeal with the Board's Office of Appeals. An extension of time has been granted until the close of business on July 23, 1971 to file such an appeal. As you know, the appeal, under Section 102.19, must "contain a complete statement setting forth the facts and reasons upon which it is based."

In our opinion, it is impossible to comply with the requirements of Section 102.19 and prepare a comprehensive and persuasive appeal without a fuller explanation

as to the basis for the Region's refusal to issue complaint. Accordingly, pursuant to the Freedom of Information Act (5 U.S.C. Section 552) and Section 102.117 of the Board's Rules and Regulations, we request that you promptly make available for public inspection and/or copying the identifiable records described below:

1. We request the specific memorandum submitted by the Advice Branch to the Nineteenth Region which resulted in the Region's refusal to issue a complaint in the instant matter. This action by the Advice Branch, which the Region was required to and did follow, constitutes final agency action of precedential import. II 1970 Report of the Labor Relations Law Section, American Bar Association, pp. 6-10. As such, the memorandum constitutes a public document under the Freedom of Information Act. See, e.g., *American Mail Line Ltd.* v. *Gullick*, 411 F. 2d 696 (D.C. Cir. 1969) and *Benson* v. *GSA*, 289 F.Supp. 590, 591 (N.D. Wash. 1968), *aff'd*, 415 F. 2d 878, 881 (9th Cir. 1969). It should be noted that analogous memoranda of the Security and Exchange Commission, pursuant to the recommendation of the Administrative Law Conference of the United States (38 LW 2657, 2658), are now made available for public inspection and copying. 17 C.F.R. 200.81. We believe that the public generally and a charging party, in particular, has a right to know the operative facts and underlying relationale which constitute the basis for the General Counsel's determination not to proceed to complaint. In the present case, such information is only available in the memoranda of the Advice Branch to the Nineteenth Region.

2. During the oral argument of the present case before the Advice Branch, counsel for Sears was informed by Advice Branch representatives of allegedly similar cases in which the Advice Branch had also instructed Regional offices to dismiss charges. Since these memoranda are not published, it is necessary, in order to prepare a meaningful appeal and understand the rationale of the Advice Branch here, that

we have access to all Advice and Office of Appeals memoranda issued within the past five years which involve issues similar to those in the instant case. In the absence of reported Board decisions presenting the same question as raised in this case, such memoranda constitute, in effect, the Board's decisional law on the issue here involved. For purposes of identification, we would define those categories of memoranda requested to include *at least* those cases involving either the propriety of withdrawals by employers or unions from multi-employer bargaining, disputes as to commencement date of negotiations, or conflicting interpretations in any other context of the Board's *Retail Associates* (120 NLRB 388) rule.

3. For similar reasons, we request the index or digest of all determinations rendered by the Advice Branch and Office of Appeals in either their existing form or any alternative form which realistically permits identification of relevant records. As noted in Professor Davis' book (p. 206):

> ". . . opinions of [the Office of Appeals] are the only available precedents on some questions. They are indexed and freely used within the office, along with similar opinions given by the Advice Branch . . . in response to requests from Regional Officers for guidance on questions of law and policy. From the Advice and Appeals opinions, the General Counsel's office compiled a 'Book of Digests' for the guidance of the staff on issues about which the General Counsel's decisions constitute the only relevant law . . ."

This "Book of Digests," or other orderly filing and indexing system, manifestly constitutes "precedents" and the kind of "final opinions, statements of policy and interpretations", and "instructions to staff that affect a member of the public", which the Freedom of Information Act contemplates should be indexed and made available to the public. Again, note that the SEC, under Section 201.81(b) of its Rules as

adopted on January 25, 1971, provides the public with essentially the same indices which we here request from the Board.

Please advise the undersigned of the time and place the information described above will be made available for inspection and/or copying and inform us of the reasonable fees, if any, required to reimburse the Board for the costs incurred in connection with this request. Should you determine that any portion of this request will not be granted, we would request that, pursuant to Section 102.117(c) of the Board's Rules, we be sent prompt notice of such a determination accompanied by a written statement of the reasons therefor.

Since the information sought to be elicited herein is essential to the preparation of the appeal in the instant case, we have concurrently herewith requested the Office of Appeals to toll the time for filing said appeal pending your ruling on the requests herein made.

Very truly yours,

LEDERER, FOX AND GROVE

By _____

LAWRENCE M. COHEN
Attorneys for Sears,
Roebuck and Co.
Charging Party

LMC:hy

cc Mr. Irving M. Herman
Director, Office of Appeals
National Labor Relations Board
Office of the General Counsel
Washington, D. C. 20570

Mr. Charles M. Henderson
Regional Director, Region 19
National Labor Relations Board
1000 Republic Bldg., 1511 Third Ave.
Seattle, Washington 98101

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

EXHIBIT "C"

[27132 CHLAC

RAAUIJAZ RUEVDEL0009 2032025-UUUU—
RUCHLAC.
NLRB
FM EUGENE G GOSLEE ACTING GENERAL COUNSEL NLRB WASH DC

TO LAWRENCE M COHEN ESQ LEDERER FOX & GROVE CHICAGO TITLE & TRUST BLDG 111 WEST WASHINGTON ST CHICAGO ILL 60602

BT

RE RETAIL CLERKS UNION, LOCAL NO. 4, RE TAIL CLERKS INT'L ASSN, AFL-CIO (SEARS, ROEBUCK & CO), CASE NO. 19-CB-1673.

RE YOUR LETTER OF JULY 14, 1971, REGIONAL DIRECTOR WILL SEND YOU LETTER SHORTLY SETTING FORTH WITH GREATER PARTICULARITY REASONS FOR HIS REFUSAL TO ISSUE COMPLAINT IN SUBJECT CASE. OFFICE OF APPEALS WILL NOTIFY YOU REGARDING TIME TO FILE ANY APPEAL YOU MAY WISH TO FILE AFTER RECEIPT OF ABOVE LETTER. WITH RESPECT TO YOUR REQUESTS FOR (1) ADVICE BRANCH MEMORANDUM IN SUBJECT CASE; (2) ACCESS TO ANY ADVICE BRANCH AND OFFICE OF APPEALS MEMORANDA IN CASES SIMILAR TO INSTANT ONE; AND (3) "THE INDEX OR DIGEST OF ALL DETERMINATIONS RENDERED BY THE ADVICE BRANCH AND OFFICE OF APPEALS . . .", SUCH REQUESTS ARE RESPECTFULLY DENIED. REASONS FOR SUCH DENIAL WILL BE SET FORTH IN LETTER TO FOLLOW.

BT

NNNN

[27131 CHLAC

[Confirmation Copy: This is a confirmation of a message telephoned to FW on 7/22 at 3:25 P.M., General Services Administration, Transportation & Communications Service, Teletype 353-5520. Message telephoned by TC]

EXHIBIT "D"

NATIONAL LABOR RELATIONS BOARD

[Logo]

OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 Jul. 23, 1971

Lawrence M. Cohen, Esquire
Lederer, Fox and Grove
Chicago Title and Trust Building
Chicago, Illinois 60602

Re: Retail Clerks Union, Local No. 4, Retail Clerks International Association, AFL-CIO (Sears, Roebuck and Co.) Case No. 19-CB-1673

Dear Mr. Cohen:

This letter is written in response to your letter of July 14, 1971, and pursuant to my teletype to you of July 22, 1971.

With respect to the denial of your request for the Regional Advice memorandum in the subject case, disclosure of Regional Advice Branch memoranda is not required under the Freedom of Information Act (5 U.S.C. Sec. 552) since such memoranda do not constitute a final disposition of a case but are rather guides for a Regional Director as to how a specific case is to be handled. Such memoranda are also privileged against disclosure under 5 U.S.C. Sec. 552(b)(5) since they are intra-agency memoranda which reflect the thought processes and legal analyses of the General Counsel's staff. See *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1358, 1359. In addition, Advice Branch memoranda constitute an integral part of the investigative process and become part of the investigative file. See 5 U.S.C. Sec. 552(b)(7). The foregoing are the reasons for denying your request for the Advice Branch memorandum in the subject case.

For the same reasons I also denied your request for access to all Advice Branch memoranda in cases similar to the instant one.

With respect to the denial of your request for "the index or digest of all determinations rendered by the Advice Branch", there is no digest system for Advice Branch memoranda. Although the memoranda are collected and filed according to the issues raised in each case for use by the Advice Branch staff as a research tool, these memoranda, individually or collected, will not be disclosed for the reasons already set forth above.

With respect to your request for decisions of the Office of Appeals in cases similar to the instant one, you are aware, of course, that the disposition of an appeal is explained in a letter sent to all interested parties. No subject index, compilation, or book of digests of these letters is maintained. Accordingly there can be no retrieval of Office of Appeals decisions in cases similar to the instant one and thus I am unable to comply with your request in this regard. For the same reason, I am unable to comply with your request for "the index or digest of all determinations rendered by . . . the Office of Appeals".

Should you have any questions with respect to this letter or the previous teletype, please do not hesitate to call on me.

Very truly yours,

/s/ Eugene G. Goslee
EUGENE G. GOSLEE
Acting General Counsel

EXHIBIT "E"

NATIONAL LABOR RELATIONS BOARD

REGION 19

[Logo]

1000 Republic Building, 1511 Third Avenue
Seattle, Washington 98101
July 26, 1971 Telephone (206) 442-4532
442-7542

Mr. Lawrence M. Cohen
Lederer, Fox and Grove
Attorneys at Law
Chicago Title and Trust Bldg.
111 W. Washington Street
Chicago, Illinois 60602

Re: Retail Clerks Int'l Assn #4
Case 19-CB-1673

Dear Mr. Cohen:

This letter sets forth with greater particularity my reasons for refusing to issue complaint in the above-captioned case and is sent pursuant to the teletype of July 22, 1971 from Acting General Counsel Goslee to you.

As a result of the investigation, I have concluded that further proceedings on the charge are unwarranted inasmuch as the employer's attempted withdrawal from the multi-employer unit occurred after the commencement of actual bargaining or negotiations in that unit and was thus untimely under the test enunciated in *Retail Associates*, 120 NLRB 388.[1] The evidence disclosed that the employer's attempted withdrawal took place after the parties to the multi-employer bargaining relationship (Silverbow Employers Association and the union) had exchanged proposals for a new contract, which exchange was, in the particular circumstances

[1] See also *Sheridan Creations*, 148 NLRB 1503; *Seattle Automotive Wholesalers Assn*, 140 NLRB 1393. Cf. *Eberlee Builders*, 186 NLRB No. 8.

of the instant case, viewed as the commencement of actual bargaining. In this letter it was noted that the exchange of proposals occurred pursuant to the provisions of Article XVIII of the expired contract which required such exchange and which provided that the exchanged proposals are to frame the issues for negotiations to the exclusion of all others and it appears that any matters not raised in the exchange of proposals are to be included without change in the subsequent contract. Thus, upon receipt of the Association's counterproposals, the parties were considered to have "agreed" to the substantial number of matters not raised in either the union's proposal or the Association's proposal. At the time of such "agreement," actual bargaining negotiations were considered to have commenced and the employer's subsequent multi-employer unit was considered to be untimely. In view of this conclusion, the union's request to bargain on an individual basis was deemed not violative of Section 8(b)(3) of the Act. I am therefore refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D.C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C. by the close of business on August 9, 1971. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and sent one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel

and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

/s/ Charles M. Henderson
CHARLES M. HENDERSON
Regional Director

cc: General Counsel, National Labor Relations Board, Washington, D.C. 20570; Sears, Roebuck and Co., 32 E. Granite Street, Butte, Montana 59701; Retail Clerks Local No. 4, 125 W. Granite, Butte, Montana 59701; Retail Clerks Intl Assn, 2819 First Ave.—Vanderveer Bldg., Seattle, WA 98121

CERTIFIED MAIL No. 909993. Return receipt requested.

EXHIBIT "F"

LEDERER, FOX AND GROVE
ATTORNEYS AT LAW
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

Philip C. Lederer
Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
Russell M. Kofoed
K. Bruce Stickler
David L. Evans

Area Code 312
Telephone 641-0200

July 29, 1971

Mr. Eugene G. Goslee
Acting General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

Re: Retail Clerks Union, Local No. 4,
Retail Clerks International Association,
AFL-CIO, (Sears, Roebuck & Co.),
Case No. 19-CB-1673

Dear Mr. Goslee:

On July 14, 1971 we wrote to you on behalf of our client, Sears, Roebuck and Co., the charging party in the above captioned case, requesting, pursuant to the Freedom of Information Act (5 U.S.C. § 552) and § 102 .117 of the Board's Rules and Regulations, that you promptly make available for public inspection and/or copying various records described in detail in our letter. The basis for our request was, *inter alia*, that without such records it was impossible to comply with the requirements of § 102.19 of the Board's Rules and Regulations and prepare a comprehensive and complete appeal of the refusal by the Regional Director for the

Nineteenth Region to issue a complaint in the instant case.

By teletype dated July 22 you advised us that our requests were denied but that we would receive a further letter from the Regional Director "setting forth with greater particularity reasons for his refusal to issue complaint in subject case". We were further advised that the reasons for the denial of our requests would be described in a letter to follow. We have now received your letter of July 23 stating the reasons for your action and the Regional Director's letter of July 28, a copy of which was sent to you, indicating "in greater particularity" the reasons for his refusal to issue complaint in the instant case. The time for filing an appeal has been extended until August 9, 1971.

After a careful consideration and analysis of both your letter of July 23 and the Regional Director's letter of July 28, we have again concluded that a comprehensive and meaningful appeal cannot be filed in the present case without the information requested in our letter of July 14. Accordingly, for this reason and because we believe that we are entitled to such information under the Freedom of Information Act as described below, we hereby renew the requests set forth in our letter of July 14. We do not believe that the reasons set forth in your letter of July 23 permit a refusal to disclose the information we have requested:

1. As set forth in paragraph 1 on page 2 of our July 14 letter, we believe that the American Bar Association, Labor Relations Law Section was correct when it stated in its 1970 Report (Vol. II, p. 7) that Advice and Appeals opinions "constitute precisely the kinds of 'final opinions, statements of policy, and interpretations,' and 'instructions to staff that affect a member of the public,' which the Freedom of Information Act contemplates should be indexed and made available to the public, 5 U.S.C. § 552(a)(2)(A), (B), and (C)." We note in this regard that, under the Board's view as well as that of prevailing authority, a determination by the General Counsel not to litigate is not reviewable in either state or federal courts. See Mr. Justice Douglas'

dissent in *Amalgamated Association* v. *Lockridge*, —— U.S. ——, 77 LRRM 2501 (June 14, 1971). In addition, we also note that your response of July 23 does not deny that a regional office is required to follow a determination by the Advice Branch as to the disposition of a particualr matter and incorporate the rationale of such a determination in the formal notification sent to the parties. Indeed, the history of this particular case amply demonstrates that the foregoing is the practice and policy of the Board.

2. Contrary to your response of July 23, we do not believe that Advice or Appeals memoranda are privileged against disclosure under 5 U.S.C. § 552(b)(5). In contrast to *International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1439 (2d Cir. 1971), such Advice and Appeals memoranda are clearly "legally germane", determinative rather than "only advisory in character," and are not merely "preliminary" in nature. We reiterate that we are not seeking either the Region's request for advice or any of the internal deliberations of the Advice Branch or the Region; we are seeking only the final determination of the Advice Branch which made mandatory the dismissal of the instant charge. Accordingly, what we request would not inhibit candid interagency discussions or delve in any manner into the mental processes of Board agents. Finally, it is our opinion that the information we have requested could be discovered under Rule 26(b) of the Federal Rules of Civil Procedure in a civil suit against the Board and would, therefore, "constitute memorandums or letters which would . . . be available by law to a party other than an agency in litigation with the agency", 5 U.S.C. § 552 (b)(5).

3. Similarly, we do not believe that Advice or Appeals memoranda are privileged against disclosure under 5 U.S.C. § 552(b)(7). Initially, the information we have requested is not "compiled for law enforcement purposes" since, by reason of the dismissal letter, no such enforcement is contemplated. Moreover, we again note that we are not requesting any of the investigatory files of the Board or its internal deliberations. We are only seeking the legal conclusion of the Advice Branch which

resulted in the Region's dismissal of this case. Accordingly, what we have requested cannot in any manner harm any court case the Board may hereafter file. In the absence of such "imminent" harm, exemption 7 does not permit a refusal to disclose information. See S.Rep. No. 813 on S. 1160 and *Bristol-Myers* v. *F.T.C.* 424 F. 2d 935 (1970).

4. While you make no assertion that the information we have requested is not identifiable, nor would any such assertion lie (see *Wellford* v. *Hardin*, 315 F.Supp. 175 (D.Md., 1970)), you do claim that some of the information requested is not maintained in the particular form sought. As to Advice memoranda and the digest or index of such determinations as requested in paragraphs 2 and 3, pp. 2 and 3 of our letter of July 14, your response indicates that such memoranda are "collected and filed according to the issues raised in each case . . . ." Therefore, since we believe for the reasons already stated that such memoranda are required to be disclosed under the Freedom of Information Act, our previous request is clarified to encompass, in addition to all Advice memoranda issued within the past five years involving issues similar to those in the instant case as described in our previous request, a listing of those issues for which separate files of memoranda are maintained by the Advice Branch. Your response states that "no subject index, compilation, or book of digests" is maintained for the appeal disposition letters sent to parties by the Office of Appeals. Since such determinations are, however, identifiable we believe that the fact "that to find the material would be a difficult or time-consuming task is of no importance" (*Wellford* v. *Hardin*, *supra*), particularly as we have offered to pay any costs involved. Alternatively, as to Appeals memoranda and the index or digest of such determinations as requested in paragraphs 2 and 3, at pages 2 and 3 of our July 14 letter, we offer to make available a representative of this office for the purpose of examining such memoranda in order to compile the information previously requested. Such representative, we request, should be provided access to all Appeals determinations within the past five years so

that he may ascertain those cases involving issues similar to those in the instant case.

Please advise the undersigned of the time and place the information described above will be made available for inspection and/or copying and inform us of the reasonable fees, if any, required to reimburse the Board for the costs incurred in connection with this request. Should you determine that any portion of this request will not be granted, we would request that, pursuant to Section 102.117(c) of the Board's Rules, we be sent prompt notice of such a determination accompanied by a written statement of the reasons therefor.

Since the information sought to be elicited herein is essential to the preparation of the appeal in the instant case, we have concurrently herewith requested the Office of Appeals to toll the time for filing said appeal pending your ruling on the requests herein made.

Very truly yours,

LEDERER, FOX AND GROVE

By /s/ Lawrence M. Cohen
LAWRENCE M. COHEN
Attorneys for Sears,
Roebuck and Co.
Charging Party

LMC:hy

cc Mr. Irving M. Herman
Director, Office of Appeals

Mr. Charles M. Henderson
Regional Director, Region 19

EXHIBIT "G"

[Logo]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 Aug. 4, 1971

Lawrence M. Cohen, Esquire
Lederer, Fox and Grove
Chicago Title and Trust Building
Chicago, Illinois 60602

Re: Retail Clerks Union, Local No. 4,
Retail Clerks International
Association, AFL-CIO
(Sears, Roebuck and Co.)
Case No. 19-CB-1673

Dear Mr. Cohen:

This letter is in response to your letters of July 28 and 29, 1971, to Mr. Herman and myself, respectively, and also confirms the August 2, 1971, telephone conversation between Mr. Miller of the Office of Appeals and you.

With regard to your letter of July 29, in which you renewed your requests for the material sought in your original letter of July 14, I must deny your requests, since your new letter does not present any substantial reasons for changing the views previously communicated in my earlier letter.

However, since there may be some misunderstanding on your part with respect to the issues you have raised, some additional comments are in order. Thus, I note that you characterize an Advice Branch memorandum as a "final determination" or a "legal conclusion". In this regard, I can only repeat what I said in my previous letter, i.e., that Advice Branch memoranda are merely guides for a Regional Director as to how a specific case is to be handled and such memoranda reflect the thought processes and legal analyses of the General Counsel's staff. Similarly, I note that you appear to be under the impression that a Regional Office is required "to incorporate the rationale of [an Advice Branch memo-

randum] in the formal notification sent to the parties." In fact, a Regional Director prepares his own letter to the parties in virtually all cases in which he refuses to issue complaint, including cases previously sent to the Advice Branch. If there is an Advice Branch memorandum in a particular case, he uses that memorandum only as a guide in preparing his letter.

Your letter of July 29 also makes certain requests not previously made by you. With respect to your request for "a listing of those issues for which separate files of memoranda are maintained by the Advice Branch", such request is denied. In my previous letter, I explained to you my reasons for concluding that disclosure of Advice Branch memoranda is not required under the Freedom of Information Act (5 U.S.C. Sec. 552). Based on that conclusion, I informed you that such memoranda would not be disclosed to you, either individually or in the collected form in which they are used by the Advice Branch staff as a research tool. For these same reasons, I am denying the aforementioned new request.

I am also denying your request for access to all Appeals determinations within the past five years. Insofar as your request includes cases in which an appeal was sustained, such determinations are not "final opinions" and there is therefore no requirement that they be disclosed. With respect to cases in which an appeal was denied, the requested materials would include several thousand Appeals determinations. It is our view that since this material does not have "precedential significance", the disclosure of such material is governed by Subsection (3) of the Freedom of Information Act rather than Subsection (2). Subsection (3) requires that one requesting disclosure of agency records governed by that section must provide a reasonably specific description of the particular record sought. Since you have not specified or identified these determinations in any way, I believe there is no obligation on our part to honor such a blanket request. I may add that we do not maintain a separate collection of Appeals determinations in which an appeal is denied. Rather, all Appeals determinations are collected chronologically, without regard to whether an appeal was sustained or denied. Accordingly, in order to meet a request for "final opinions", i.e., those in which an appeal was denied, it would be necessary to separate such cases from those in which the appeal was sustained in whole or in part. We could not permit your representative to separate these two types of cases since this would necessarily involve access to nondisclosable materials, i.e., Appeals determinations in which the appeal was sustained in the whole or in part. Nor do I consider it warranted in the circumstances to expend Agency time and effort for the performance of this task, even if the Agency were subsequently reimbursed for the expenses involved.

With respect to your letter of July 28 to Mr. Herman, I am denying your request for an extension of the time within which your appeal must be filed in the above-captioned case. Accordingly, such appea' must be received by the close of business, August 9, 1971.

Should you have any questions with respect to this letter, please do not hesitate to call upon me.

Very truly yours,

/s/ Eugene G. Goslee
EUGENE G. GOSLEE
Acting General Counsel

EXHIBIT "H"

[Logo]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 August 20, 1971

Re: Retail Clerks Union, Local No. 4,
Retail Clerks International
Association, AFL-CIO
(Sears, Roebuck and Company)
Case No. 19-CB-1673

Lawrence M. Cohen, Esq.
Lederer, Fox & Grove
Chicago Title and Trust Building
Chicago, Illinois 60602

Dear Mr. Cohen:

Your appeal in the above matter has been duly considered.

The appeal is sustained. The Union's refusal to bargain with the Company following the latter's withdrawal from a multiemployer association raised issues warranting Board determination. The investigation disclosed that Sears had withdrawn from the Employers Association prior to the first meeting between the Union and the Association. Although Article XVIII of the existing agreement between the Union and the Association contemplated a preliminary exchange of written proposals prior to the initial meeting of the parties, and the evidence showed that such proposals had been exchanged, Section E of that Article, which stated that "[n]egotiation, conciliation, arbitration or hearing on the issues . . . must be *commenced* [following] receipt of counternotice," [emphasis supplied], indicated that the parties had not intended to consider such preliminary exchange of proposals as constituting "actual bargaining negotiations" within the meaning of *Retail Associates, Inc.*, 120 NLRB 388, 395. See *Seattle Automotive Wholesalers Association*, 140 NLRB 1393. Sears' unequivocal withdrawal

from the Association prior to the first meeting was therefore deemed timely.

Accordingly, the case is remanded to the Regional Director with instructions to issue an appropriate 8(b)(3) complaint, absent settlement. All further inquiries should be addressed to the Regional Director.

Very truly yours,

EUGENE G. GOSLEE
Acting General Counsel

By /s/ Irving M. Herman
IRVING M. HERMAN
Director, Office of Appeals

cc: (See next page.)

CERTIFIED MAIL

Re: Case No. 19-CB-1673

cc: Director, Region 19

Retail Clerks Union Local No. 4, 125 W. Granite, Butte, Montana 59701
Sears, Roebuck & Co., 32 E. Granite St., Butte, Montana 59701
Retail Clerks Intl. Assn., 2819 First Ave., Seattle, Wash. 98121
Allan C. Raywid, Esq., 2011 I St., N.W., Wash., D.C.

EXHIBIT "I"

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 19

Case No. 19-CB-1673

RETAIL CLERKS UNION, LOCAL NO. 4, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

and

SEARS, ROEBUCK AND CO.

COMPLAINT AND NOTICE OF HEARING

It having been charged by Sears, Roebuck and Co. (herein called Sears) that Retail Clerks Union, Local No. 4, Retail Clerks International Association, AFL-CIO (herein called Respondent) has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act as amended, 29 U.S.C. Sec. 151 *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of said Board, by the undersigned Regional Director for Region 19, acting pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge herein was filed on April 9, 1971, and a copy thereof was served upon Respondent by registered mail on or about that same date.

2. a. Sears is a New York corporation engaged in the operation of retail department stores throughout the United States, including the state of Montana.

b. Sears' Butte, Montana Department Store is the only store involved in this proceeding.

c. During the past year, in the operation of its Butte, Montana store, Sears' gross volume of business exceeded $500,000 and it purchased directly from outside the state of Montana products valued in excess of $100,000.

3. Sears is, and has been at all times material herein, an Employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5. a. Silver Bow Employer's Association (herein called the Association) is, and has been at all times material herein, an association of employers in and around Butte, Montana, established and existing for the purpose of, *inter alia*, representing employers in negotiations with labor organizations.

b. On August 15, 1968, the Association and Respondent executed a collective bargaining agreement covering certain employees of the members of the Association, then including Sears, Butte store. Said agreement had an effective date of May 1, 1968 and expired April 30, 1971.

6. a. On March 23, 1971, Sears, by telegram, notified Respondent and the Association that it was resigning from, and withdrawing as an employer member of, the Association.

b. Sears notification of withdrawal from the Association was communicated to both the Association and Respondent prior to the commencement of negotiations for a new collective bargaining agreement between Respondent and the Association.

7. The following employees of Sears' Butte store constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Department heads, salespeople, window trimmers, mail order department employees, floor walkers, milliners, cashiers, bundle wrappers, collectors, advertising writers, alteration department employees, shipping and receiving clerks, stock clerks, checkers,

and all persons who are actively engaged in handling or selling merchandise, including both journeymen and apprentice grades, exclusive, however of: persons regularly employed eight (8) hours or less per week, errand boys, office employees, janitors, salesmen who spend more than sixty (60%) per cent of the time outside of the city, and outside salesmen soliciting on a commission basis, and further, exclusive of supervisory employees within the meaning of the National Labor Relations Act, as amended.

8. Respondent is the only recognized exclusive collective bargaining representative of the employees in the Sears' Butte store unit described above in paragraph 7, within the meaning of Section 9(a) of the Act.

9. Since on or about March 23, 1971, Respondent has refused to bargain separately with Sears in the bargaining unit described above in paragraph 7 with respect to terms and conditions of employment, and has insisted that Sears is bound by any agreement reached by and between Respondent and the Association, notwithstanding the fact that Sears effectuated a timely withdrawal from the Association as set forth in paragraph 6 above.

10. By its acts and conduct described above in paragraph 9 and by each of said acts, Respondent did refuse, and is refusing, to bargain collectively with Sears and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(b)(3) of the Act.

11. The acts of Respondent described in paragraph 9 above, occurring in connection with the operations of Sears as described above in paragraph 2, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states of the United States, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 9th day of November 1971, at 10:00 a.m. in the Grand Jury Room,

314, Federal Building, Butte, Montana, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board, is attached.

YOU ARE FURTHER NOTIFIED that pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the Regional Director for Region 19 an original and four copies of an answer to said Complaint within ten (10) days from the service thereof and that should Respondent fail to so do, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Pursuant to Section 102.22 of the Board's Rules and Regulations, upon my own motion, I am extending the time in which to file answer to October 1, 1971.

Dated this 1st day of September 1971, at Seattle, Washington.

CHARLES M. HENDERSON

Charles M. Henderson, Regional Director
National Labor Relations Board, Region 19
1511 Third Avenue, 1000 Republic Building
Seattle, Washington 98101

[Caption omitted in Printing]

DEFENDANTS' ANSWER TO AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

The General Counsel of the National Labor Relations Board hereby answers the amended complaint as follows:

(1) Admits that this action arises under 5 U.S.C. Sec. 552;

(2) Admits that this Court has jurisdiction over this action under 5 U.S.C. Sec. 552;

(3) Avers that this action is not appropriately a class action under Rule 23(b)(2) since the questions of law and fact are not common to the class sought to be represented:

(4) Admits the allegations of paragraph 4;

(5) Admits the factual allegations of paragraph 5, but denies that the National Labor Relations Board is appropriately a defendant in this suit;

(6) Admits the allegations of paragraph 6;

(7) Admits the factual allegations of paragraph 7, namely, that Arnold Ordman was General Counsel of the National Labor Relations Board from 1963 to and including June 25, 1971, and that Peter G. Nash is and has been General Counsel at all times since August 24, 1971, but denies that the practice of Nash with respect to the disclosure of any agency records which may be involved in the instant complaint is the same as that of Goslee;

(8) Admits the factual allegations of paragraph 8 with respect to the function of the Regional Advice Branch as set forth in 32 F.R. 9588, Section 202.1.1 and admits that the Regional Advice Branch issues memoranda to the Regional Directors, but denies that it issues mandatory instructions with respect to the final disposition of charges filed with the General Counsel or the issuance of unfair labor practice complaints;

(9) Admits the allegations of paragraph 9 with respect to the duties of the Office of Appeals as set forth in Section 102.19 of the Board's Rules and Regulations

and Section 202.1.2 of 32 F.R. 9588, but denies that the Office of Appeals determinations are always communicated to the Regional Director by means of a memorandum;

10) Admits the allegations of paragraph 10 to the effect that it has been the past practice of the Office of General Counsel to refuse to make the requested information available on the grounds that it is privileged from disclosure under the Freedom of Information Act, but denies all other allegations of paragraph 10;

(11) Admits the factual allegations of paragraph 11, but denies that the Regional Director for the Nineteenth Region acted pursuant to mandatory instructions from the Advice Branch in dismissing the complaint;

(12) Admits the allegations of paragraph 12;

(13) Admits the allegations of paragraph 13;

(14) Admits the allegations of paragraph 14;

(15) Denies that the General Counsel is depriving plaintiff, or the class it seeks to represent, of information to which there is a right of access under the Freedom of Information Act;

(16) Admits that this Court has jurisdiction to determine whether the plaintiffs have a right to the requested information under the Freedom of Information Act, but denies that a class action appropriately lies and denies that a claim has been made out on which a declaratory judgment can appropriately be entered by this Court;

(17) Denies all other allegations of the complaint not herein specifically admitted.

Further answering, the General Counsel states the following:

(1) The amended complaint should be dismissed as to the defendant, National Labor Relations Board, since it is not appropriately a party defendant. Section 3(d) of the National Labor Relations Act delegates to the General Counsel final, unreviewable authority over the investigation of charges and the issuance of complaints and all the requested information relates solely to the performance of that duty by the General Counsel;

(2) The amended complaint should also be dismissed as to defendant Goslee. The amended complaint was filed on October 14, 1971, Goslee was not the Acting General Counsel at that time, and has not been since August 24, 1971;

(3) Peter G. Nash was at the time of the filing of the amended complaint and still is, the General Counsel of the National Labor Relations Board. Since the action is against Goslee in his capacity as General Counsel, Peter G. Nash should be substituted for Goslee as defendant;

(4) The General Counsel has stated to counsel for plaintiff Sears by letter of this date that he will make available the Advice memoranda for the past 5 years in cases similar to those involved in plaintiff Sears' case (Board Case No. 19-CB-1973), as defined with more particularity in Sears' request for information (Ex. B to the Amended Complaint). Deleted from the memoranda will be all identification of witnesses, confidential sources of information and other matters of "security sensitive" nature. Memoranda in current cases will be made available when litigation of the case at the agency level has been completed (See, Exhibit 1, attached hereto);

(5) The General Counsel has concluded that the letters sent to parties by the Office of Appeals are public information which will be made available for inspection and copying. He has offered to make available to plaintiff all such letters for the past 5 years in cases involving similar issues as described in paragraph (4) above. In addition, the General Counsel has offered to make available memoranda which the Office of Appeals prepares in some of these cases and sends to the regional directors, again subject to completion of litigation of these cases before the agency (See, Exhibit 1, attached hereto);

(6) The General Counsel has also offered to make available to plaintiff the index of Advice memoranda maintained for internal use. (See, Exhibit 1, attached hereto);

(7) The Office of Appeals has not heretofore maintained a subject index which would allow quick retrieval of information, in the form presently described by plaintiff. Nevertheless, the General Counsel has offered to search the chronological files and make the requested Appeals' materials available. However, since it is estimated that the cost of such a search will be substantial, the General Counsel has offered to meet with plaintiff Sears to discuss whether the information requested may be furnished at a lesser cost in time and money than that presently anticipated by the Office of Appeals;

(8) No injunction should be entered since the General Counsel is withholding no information from plaintiff which is not privileged from disclosure by 5 U.S.C. Sec. 552.

WHEREFORE, defendants demand judgment that the complaint herein be dismissed.

Dated at Washington, D.C. this 3rd day of February 1972.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

By /s/ Glen M. Bendixsen
GLEN M. BENDIXSEN
CHIEF OF SPECIAL LITIGATION
Washington, D.C. 20570
Telephone: (202) 382-5401

Co-counsel: CHARLES N. STEELE
(Ext. 6164)
JANET MORRIS
(Ext. 4087)

Attorneys for Defendant

EXHIBIT 1

[Logo]

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 February 3, 1972

Lederer, Fox and Grove
Att'n: Lawrence M. Cohen
Chicago Title and Trust Building
111 West Washington Street
Chicago, Ilinois 60602

Re: *Sears, Roebuck and Co.* v. *National Labor Relations Board*
Civil Action No. 1571-71 (D.C.D.C.)
Board Case No. 19-CB-1673

Dear Mr. Cohen:

I have decided to make available for inspection and copying all memoranda from the Regional Advice Branch to the Regional Directors for the past five (5) years in cases which, like Board Case No. 19-CB-1673, involve the issue of the timeliness of a withdrawal from multi-employer bargaining. We will delete from these memoranda all identification of witnesses, confidential sources of information and matters of "security sensitive nature." Moreover, I will not make these memoranda available until litigation of the case before the agency has been completed. Thus, in cases where the Regional Office dismisses the complaint, the Advice memoranda will not be made available until the time for an appeal to the Office of Appeals has run or an appeal has been denied pursuant to Sec. 102.19 of the Board's Rules and Regulations, 29 C.F.R. 102.19. In cases where a complaint issues (including complaint after sustaining an appeal) the Advice memoranda will not be made available until after the Board's Decision and Order has issued, which shall include the normal time for filing a motion for reconsideration pursuant to Section 102.48(d) of the Board's Rules and Regulations, 29 C.F.R. Sec. 102.48(d).

In cases which are settled at any stage of the proceeding (including formal and informal settlements, as well as out-of-Board adjustments), the Advice memoranda will be made available only after the parties have complied with the terms of the settlement agreement.

I am also making available the Advice Branch index in its present form. However, we wish to caution you that the index was prepared and has been maintained solely for the guidance of agency personnel in their research of cases submitted, and may incompletely identify cases on the subject matter in question. The memoranda and index will be made available to you for inspection and copying at a date mutually convenient to you and Mr. Gerald Brissman, Assistant General Counsel in charge of the Advice Branch. Or, if you prefer, we will send you xerox copies of the relevant memoranda and index and charge you for the cost of copying.

Letters sent to the parties by the Office of Appeals are public information, and will, accordingly, be made available for your inspection and copying. I will also make available the memoranda sent by the Office of Appeals to the regional directors analyzing appeals cases. Such memoranda are not, however, prepared in all cases. Here again, as with Advice memoranda, release will be authorized only after litigation of the case before the agency is complete. That is, memoranda sent to Regional Directors authorizing dismissal of a complaint will be immediately available; those authorizing issuance of a complaint will become available after compliance with a settlement agreement or after the Board's Decision and Order has issued and the time for filing a motion for reconsideration has run.

The Office of Appeals, however, has never maintained a subject matter index of either the letters or the memoranda, indexing them instead by their Board Case number and in a chronological file. Accordingly, retrieving these materials will require considerable time and effort, since it will require that agency personnel go through the chronological files, read the memoranda to identify those pertaining to your request and delete any matters which identify witnesses, or reveal confidential sources

of information on matters of a "security sensitive nature." Thus, though these materials can be located, Irving Herman, Director of the Office of Appeals, estimates that, once agency personnel can be assigned to the task, it will take roughly three man weeks to separate them out from the approximately 7000 to 8000 cases involved, at a cost that may run as high as $3000. In view of the high costs involved, I or one of my representatives would be glad to meet with you to explore whether your request could be satisfied with less expenditure of time and money.

Finally, I would like to call your attention to the fact that, while I am agreeing to make the above documents available I do not consider that this agency is bound in all instances to do so and, further, I consider them neither binding authority nor even authoritative precedent for decisions made in either current or future cases.

Very truly yours,

/s/ Peter G. Nash
PETER G. NASH
General Counsel

[Caption omitted in Printing]

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. This Court has jurisdiction over this action under 5 U.S.C. § 552.

2. Sears, Roebuck and Co. (hereafter "Sears") is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

3. Defendant National Labor Relations Board is an independent Federal Agency created and existing under the Labor Act, 29 U.S.C. 141, *et seq.*, with its principal offices in Washington, D.C.

4. Defendant Eugene G. Goslee (hereafter "Goslee") was, during the period from June 25, 1971 to and including August 24, 1971, the Acting General Counsel, and Arnold Ordman and Peter G. Nash (hereafter "Ordman" and "Nash") were during the periods from 1963 to and including June 25, 1971, and from August 24, 1971 to date, respectively, the General Counsel of the National Labor Relations Board, an office created by and existing under Section 3(d) of the National Labor Relations Act (hereafter the "Act"), with principal offices in Washington, D.C., and as such were empowered, on the Board's behalf, to issue or refrain from issuing unfair labor practice complaints under Section 10 of the Act (a power which has been delegated to the Board's Regional Directors, see Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.15) and, pursuant to Section 102.117(c) of the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.117(c), to receive and answer requests for certain agency records.

5. On or about April 9, 1971, Sears filed an unfair labor practice charge with the Regional Director of the Nineteenth Region of the National Labor Relations Board (hereafter the "Regional Director") against Retail Clerks Union No. 4, Retails Clerks International Association, AFL-CIO (hereafter the "Union"), entitled Case No. 19-CB-1673, alleging that by various acts and conduct the Union had violated and is violating Section

8(b)(3) of the Act, and seeking issuance of a complaint by the Regional Director, acting for and on behalf of the Board's General Counsel, against the Union.

6. On or about April 27, 1971, the Regional Director referred said charge to the Advice Branch of the Office of the General Counsel in Washington, D.C. The Advice Branch has responsibility, under the supervision of the Board's General Counsel, to review requests by the Board's Regional Directors for advice and to formulate policy on novel or unsettled procedural and substantive matters arising in unfair labor practice cases. Section 201.11 of the Board's Statements of Procedure, Series 8, as amended, 32 C.F.R. 9588. In this capacity, the Advice Branch issues instructions to said Regional Directors with respect to final disposition of unfair labor practice charges and the issuance of unfair labor practice complaints. Said instructions, along with the precedents, theories and analyses in support thereof and occasional references to relevant prior Advice determinations, are communicated to the Regional Directors by means of a memorandum (hereafter "Advice Memorandum"). Exhibits 10, 11 and 12 attached to and made a part hereof, as described hereafter, are representative examples of said Advice Memorandum.

7. On or about June 10, 1971, after receipt of an Advice Memorandum from the Advice Branch, the Regional Director informed Sears that he was refusing to issue a complaint with respect to the charges filed by Sears in Case No. 19-CB-1673. He further notified Sears that said determination would be final unless timely review thereof was sought before the Office of Appeals of the Office of the General Counsel in Washington, D.C. pursuant to the applicable rules and regulations of the Board. A true and correct copy of said letter is attached to and made a part of the Amended Complaint as Exhibit "A".

8. The Office of Appeals has responsibility to review appeals from the refusal of a regional director to issue an unfair labor practice complaint and, under the supervision of the Board's General Counsel, to sustain or reverse said refusal. Section 202.1.2 of the Board's State-

ments of Procedure, Series 8, as amended, 32 C.F.R. 9588; Section 102.19 of the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.19. Said determination of the Office of Appeals, along with the precedents, theories and analyses in support thereof and occasional references to relevant prior Appeals determinations, are ordinarily communicated to the Regional Directors by means of a memorandum (hereafter "Appeals Memorandum"). Exhibits 3, 4, 5, 6, 7, 8 and 9 attached to and made a part hereof, as described hereafter, are representative examples of said Appeals Memorandum.

9. On or about July 14, 1971, Sears, acting under the Freedom of Information Act and in compliance with the applicable Board rules, filed a request for information (hereinafter "request") with the Board through Goslee. In this request, Sears requested that Goslee, in accordance with the Freedom of Information Act, make available for public inspection and/or copying, the Advice Memoranda in Case No. 19-CB-1673 as well as other relevant Advice and Appeals memoranda, and the indices thereof, as more fully described in the request, a true and correct copy of which is attached and made a part of the Amended Complaint as Exhibit "B".

10. As of July 14, 1971, and continuing to February 3, 1972 as hereafter described, it was the practice of the Office of the General Counsel to refuse to make available to the Public Advice and Appeals Memoranda, and indices thereof, on the grounds that such information is privileged from disclosure under the Freedom of Information Act.

11. On or about July 22, 1971, Goslee, pursuant to the practice described in paragraph (10), by teletype to Sears, and confirmed by a letter of explanation dated the next day, refused to make available to Sears any of the information sought in its request of July 14, 1971 and advised Sears that the Regional Director would inform Sears "shortly . . . . [and] with greater particularity" the reasons for his refusal to issue complaint. True and correct copies of the teletype and letter are

attached to and made a part of the Amended Complaint as Exhibits "C" and "D", respectively.

12. On or about July 28, 1971, acknowledging that he was acting pursuant to the direction of Goslee as set forth in Goslee's teletype of July 22, 1971, the Regional Director, again acting in accord with the aforesaid instructions of the Advice Branch, informed Sears "with greater particularity" the reasons for refusing to issue complaint and set forth additional reasons for that decision. A true and correct copy of said letter is attached to and made a part of the Amended Complaint as Exhibit "E".

13. On or about July 29, 1971, Sears filed a renewed request for information (hereinafter "renewed request") with Goslee in which Sears repeated its request for such information under the Freedom of Information Act, as more fully described in the true and correct copy of the renewed request attached to and made a part of the Amended Complaint as Exhibit "F".

14. On or about August 4, 1971, Goslee, pursuant to the practice described in paragraph 10 above, by letter to Sears, refused to make available to Sears any of the information sought in the renewed request. A true and correct copy of said letter is attached to and made a part of the Amended Complaint as Exhibit "G". In order to comply with the applicable time requirements and expressly reserving its rights involved herein, Sears under protest then timely filed its appeal in Case No. 19-CB-1673 with the Office of Appeals.

15. On or about August 20, 1971, the Office of Appeals advised Sears that its appeal had been sustained, and that the matter had been remanded to the Regional Director with instructions to issue an appropriate complaint on its behalf. A true and correct copy of said letter is attached to and made a part of the Amended Complaint as Exhibit "H". Pursuant to said instructions, the Regional Director did thereafter issue for and on behalf of the General Counsel a complaint, a true and correct copy of which is attached to and made a part of the Amended Complaint as Exhibit "I".

16. The information Sears sought in its request and renewed request has not been made available to Sears except to the extent that it has been provided as described in a letter from Nash to Sears dated February 3, 1972. In said letter, a true and correct copy of which is attached to and made a part of the Answer as Exhibit 1, Nash admits that the letters sent to parties by the Office of Appeals are public information which will be made available for inspection and copying. In addition, Nash also agrees to make available to Sears Advice and Appeals Memoranda, and the index of Advice Memoranda maintained for internal use, although continuing to assert, as had been the policy of Ordman and Goslee, that such documents are privileged from disclosure under the Freedom of Information Act. To be deleted from such Memoranda are all identification of witnesses, confidential sources of information and other matters of "security sensitive" nature as defined by the General Counsel; and memoranda in current cases, including that in Case No. 19-CB-1673, are to be made available to Sears only when litigation of the case before the Board has been completed. Nash further advises Sears that there is no index of Appeals Memoranda presently available; the chronological files of such memoranda, however, will be made available to Sears to retrieve the information requested, as hereafter described.

17. The Committee on Practice and Procedure of the American Bar Association's Section of Labor Relations Law (hereafter the "ABA"), has repeatedly requested that the General Counsel of the Board make available to the public, under the Freedom of Information Act, Advice and Appeals Memoranda and indices thereof. See the 1970 Report of the Committee, pp. 5-10, and 1971 Report of the Committee, pp. 233-7 and 242-6, true and correct copies of which are attached to and made a part hereof as Exhibits 1 and 2.

18. At a meeting of the Committee on January 27, 1972, representatives of the General Counsel disclosed that Nash, pursuant to a renewal of the requests set forth in the preceding subparagraph, had decided to make available to the public Advice and Appeals Memo-

randa, subject to certain limitations to be discussed with the Committee, and would prepare an index thereof. Following the disclosure of this policy change, on or about February 3, 1972, Sears wrote to Nash. A true and correct copy of said letter is attached to and made a part of the Smetana affidavit as Exhibit "M" thereto. This letter was supplemented, following meetings between Sears' representatives and Nash and other representatives of the General Counsel at which the Sears' representatives again stressed such relevancy by letters from Sears to Board Associate General Counsel Irving and Nash dated February 4 and 8, 1972, respectively. True and correct copies of these letters are attached to and made a part of the Smetana affidavit as Exhibit "O" and "P" thereto.

19. By letter of February 8, 1972, Nash submitted to Sears certain Advice Memoranda, an index to Advice Memoranda, advised that other Advice Memoranda would be supplied "as soon as possible", and further advised that, as there was no index of Appeals Memoranda, procedures for their inspection would have to be "worked out". A true and correct copy of this letter is attached to and made a part of the Smetana affidavit as Exhibit "Q" thereto.

20. By letter dated February 9, 1972, Sears advised Nash that Sears would make its own personnel available to assist in retrieving the approximately 7,000 to 8,000 Appeals Memoranda which Nash had indicated would be available to Sears. In said letter, Sears also objected that it had not received identical copies of the Advice Memoranda requested but, instead, a sanitized version thereof which, in its opinion, was contrary to the requirements of the Freedom of Information Act. A true and correct copy of said letter is attached to and made a part of the Smetana affidavit as Exhibit "R" thereto.

21. Commencing on February 16, 1972, and virtually continuously thereafter to date, representatives of Sears have worked at the offices of the Board in Washington, D.C. to review the Appeals and Advice Memoranda that have been made available. The representatives of Sears have worked in accord with the instructions of the representatives of the General Counsel, to wit: (1) the decisions have been examined without disturbing their original order; (2) no written notes have been made on any substantive matters; (3) unessential conversations with Board personnel have been avoided. In the course of the investigation, for the first time, Sears representatives observed that a significant number of the Appeals Memoranda inspected and deemed pertinent to the issues presented in 19-CB-1673 were incomplete in that they relied upon the "circumstances of the case" without delineating those circumstances. Exhibits 3, 4 and 5 attached to and made a part hereof are true and correct copies of Appeals Memoranda that were made available to Sears and are representative of such cases. In addition, other Appeals memoranda inspected were incomplete in that they incorporated by reference and relied upon provisions in various extraneous documents without describing or attaching to the memoranda such other documents. Exhibits 6, 7 and 8 attached to and made a part hereof are true and correct copies of Appeals Memoranda that were made available to Sears and are representative of such cases. Exhibit 9 attached to and made a part hereof is a true and correct copy of an Appeals Memoranda that was made available to Sears and is the sole example, in all the Appeals Memoranda investigated, of any contrary practice. Exhibits 10, 11 and 12 attached to and made a part hereof are true and correct copies of Advice Memoranda that have been made available to Sears.

22. As a result of observations described in the preceding paragraph, by letter dated March 1, 1972, Sears requested Nash make available to Sears, under the Freedom of Information Act, the "underlying data and/or documentation" necessary to intelligently assess those memoranda which it had been discovered were pertinent to Case No. 19-CB-1673 and which referred to such data and documentation. The nature of such data and documentation, e.g., collective bargaining agreements or similar documents upon which the pertinent memoranda relied and copies of the underlying regional directors' decisions from which the appeals had been taken, was

also set forth in said letter. A true and correct copy of said letter to Nash is attached to and made a part hereof as Exhibit 13. By letters dated March 14 and April 11, 1972, true and correct copies of which are attached hereto and made a part hereof as Exhibits 14 and 15, Sears clarified its request that various Advice memoranda and Appeals letters and memoranda be made available.

23. By letter dated March 7, 1972, Nash advised Sears that he was denying Sears' request for the additional information sought in its letter of March 1, 1972. Nash further noted that various matters had been deleted from the Appeals memoranda which had been made available. A true and correct copy of this letter is attached hereto and made a part hereof as Exhibit 16.

24. The hearing in Case No. 19-CB-1673 has been continued to date and, following issuance of this Court's preliminary injunction enjoining the Board from proceeding in Case No. 19-CB-1673 until Sears has had a reasonable time to (i) inspect and analyze that information which has been made available; (ii) resolve the still unresolved dispute as to the remainder of the information sought; and (iii) inspect and analyze such additional information if it is made available, the Regional Director postponed indefinitely the hearing in Case No. 19-CB-1673.

25. By letter dated May 17, 1972, Sears advised Nash of the current status of its investigation and analysis of the Advice and Appeals memoranda received. In said letter, Sears again objected that it had not received the underlying documentation requested and to the deletion of various information from said memoranda. Additionally, Sears specified the reasons relied upon to support such objections. A true and correct copy of said letter is attached to and made a part hereof as Exhibit 17.

Dated at Washington, D.C. this 22nd day of May 1972.

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

ALAN RAYWID
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C.

LAWRENCE M. COHEN
LEDERER, FOX & GROVE
111 West Washington Street
Chicago, Illinois 60602

Attorneys for Plaintiff

Of Counsel:

COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C.

LERDERER, FOX & GROVE
111 West Washington Street
Chicago, Illinois 60602

EXHIBIT 1

PROCEDURE UNDER THE NATIONAL LABOR RELATIONS ACT (1970)

4. BOARD DECISIONS

At the present time the Board is two years behind in publishing its decisions in bound volumes. The Board's Liaison Committee expressed deep concern over the problem of delay and observed that the inconvenience experienced by the Labor Bar was shared by the Board personnel as well. The Liaison Committee indicated that a basis for long-term improvement, however, has been developed. The Government Printing Office has begun the publication of Board decisions by an electronic photocomposition method which should reduce the publication time to approximately three to five months following issuance of the Board's slip decisions.

Implicit, however, in coping with the problem of delay has been the fact that the costs of printing and publication must be borne by the Board out of its general budget. In view of the fact that a ceiling has been placed on the number of employees which the Agency may retain, and with an increase in case-load and a decrease in the budget, the first employees to be released are the non-case handling personnel. Thus, the alleviation of this aspect of the problem of delay is directly tied to budgetary considerations and the availability of funds to arrange for employment and allocation of necessary personnel to engage in editing, proofreading, copy work, etc. The Board indicated that even with the necessary funds, it would take about two years to eliminate the publication backlog. In the interim there is hope that some measurable and steady reduction of delays in publication can be made notwithstanding increasing costs and budgetary limitations.

5. WEEKLY SUMMARY (Rules and Regulations)

The Board's Division of Information prepares a *Weekly Summary* of cases which is available to *anyone* upon request. At your Committee's suggestion, the Board's Liaison Committee agreed to give serious consideration to publication of changes of Rules and Regulations in the *Weekly Summary*, thereby giving practitioners the text of such changes earlier than they would otherwise be made available through the services of the Government Printing Office.

The foregoing discussion dealt with areas and materials which the Board has prepared, updated and made available to the public in keeping with the spirit of the Freedom of Information Act. The following discussion deals with areas where to date the Board has not made available information required by the Act.

A. *Index of Unpublished Material*—Your Committee has repeatedly sought to persuade the Board to make available an index of unpublished material. The Board has steadfastly asserted that it is not feasible to prepare a "meaningful" index, either because the material would be so general as to be of minimal value or, if made specific, would thereby disclose the substance of the material which, in the Board's view, would violate *its obligation of non-disclosure.* The Board also feared that publication of such an index would encourage litigation and would place the Board in the forefront of an area where, in the Board's view, other agencies of government have been disinclined to enter. The Board also noted that any work which would be involved in the consideration or preparation of an index or other materials sought under the Freedom of Information Act would have to be evaluated in the light of the reduction in the Board's 1971 budget which would necessarily reflect itself in the reductions of staff personnel. The Board stressed that with a projected 5% increase in case load, coupled with the lower budget, in the absence of some specific appropriation or special earmarking of funds to deal with Freedom of Information Act responsibilities, it would continue to place primary emphasis in staff as-

signments to personnel engaged in the processing and handling of cases.

Your Committee continues to adhere to its previous position that the Freedom of Information Act imposes an affirmative obligation for disclosure and that even in the absence of any such obligation, the Board should provide for public access to all materials which would not interfere with, or otherwise prejudice the operations of the agency. While your Committee appreciates and recognizes the practical problems which budgetary limitations have posed for the Board, the Freedom of Information Act, like the NLRA itself, is federal law and Congress has directed the Board to comply with its provisions.[1] While the Board may be required to make some accommodations and adjustments in order to discharge its varied responsibilities, pending Congressional relief through further appropriations, your Committee believes the Board should immediately undertake the preparation of an index of unpublished material.

B. *Advice and Appeals*—Your Committee also requested the Board to prepare an index of all determinations rendered by the General Counsel on cases submitted to the Advice Branch and the Office of Appeals, and that the Board make available, upon request, copies of *Advice and Appeal Memoranda*. Since the Committee's request for an Advice and Appeals Index and copies of such agency determinations was raised for the first time this past year, a more detailed discussion would appear warranted.

First, it should be clearly recognized that what your Committee is seeking are copies of all Memoranda or other documents reflecting decisions, recommendations, interpretations or policies formulated by the Advice Branch and by the Office of Appeals. Where the Advice Branch

[1] The NLRB has been admonished not "to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Southern Steamship Co.* v. *N.L.R.B.*, 336 U.S. 31, 47.

directs the Regional Director to issue a complaint, or where a Regional Director's dismissal is reversed on appeal and a complaint is subsequently issued, the subject matter, theory, and interpretation will ultimately be ventilated through the course of hearing, Trial Examiner and Board decisions, and perhaps review and adjudication in the courts. It is in all the remaining cases, however, where the General Counsel either through the Advice Branch or through the Office of Appeals determines that issuance of complaint *is not warranted*, and that such determination constitutes final agency action of precedential import. As Professor Davis stated in his book, *Discretionary Justice* (p. 206):

> " . . . Since many problems get no further in the Board's machinery than the Office of Appeals, opinions of that Office are the only available precedents on some questions. They are indexed and freely used within the office, along with similar opinions given by the Advice Branch of the General Counsel's Office in response to requests from Regional Officers for guidance on questions of law and policy. From the Advice and Appeals Opinions, the General Counsel's Office compiled a 'Book of Digests' for the guidance of the staff on issues about which the General Counsel's decisions constitute the only relevant law . . . ."

Your Committee believes that these "precedents" constitute precisely the kinds of "final opinions, statements of policy and interpretations," and "instructions to staff that affect a member of the public," which the Freedom of Information Act contemplates should be indexed and made available to the public, 5 U.S.C. § 552(a)(2)(A), (B), and (C).[2]

[2] Cf. Internal memoranda prepared by the General Services Administration which, on their face, are similar to memorandum prepared by the Office of Appeals and which the 9th Circuit determined to be within the disclosure requirements of § 552(a)(2)(B), *Benson* v. *GSA*, 289 F.Supp. 590, 591 (N.D. Wash. 1968), 415 F.2d 878, 881 (9th Cir. 1969). Compare also the "no action" letters prepared by staff personnel of the Security and Exchange Commission which, as is true of the Advice and Appeals memoranda, indicate

There should not be any need to extensively elaborate on the point that a determination by the General Counsel *not to litigate* not only constitutes the kind of "final agency action" which affects members of the public, but that members of the public have an abiding need to review such determinations to ascertain what "policies" and "law" the Office of the General Counsel is pursuing.[3] Moreover, since the policy of the Information Act is to provide ready access for members of the public to the law and policy of agencies that affect them, the public is entitled to know whether the Advice Branch or Office of Appeals has ever decided that certain issues are not deemed actionable by references to the underlying facts and the rationale which supports the conclusion reached.

Presently, the public has full access to the published Board and Trial Examiners' Decisions from which insight as to the applicable law and developing policy may be gleaned from the reported facts, conclusions and determinations. And with respect to reported decisions, the Board (and other publication services) provides an index (and digest) so that the public may seek out those issues and precedents which affect them. In the same vein the public requires, and is entitled to receive, more

that on the basis of submitted facts and applicable law and rationale, "no [legal] action" will be taken. The Administrative Law Conference of the United States, during June 1970, "overwhelmingly approved a recommendation that the [SEC] publish 'no action' letters issued by the SEC or its staff." 38 L.W. 2657, 2658.

[3] It should be noted that the materials which your Committee seeks are predicated upon the general rights extended "any person" under § 552(a)(3) of the Freedom of Information Act and, as has been judicially determined, any member of the public seeking such information need not demonstrate any particularized "need" or that such person is involved in a proceeding before the agency. See *Tuchinsky* v. *Selective Service System*, 294 F.Supp. 803 (N.D. Ill. 1969), *aff'd* 418 F.2d 155 (7th Cir. 1969); *Bristol Myers* v. *FTC*, (D.D.C. 1968), reversed on appeal —— F.2d ——, (D.C. Cir. 22,277, March 26, 1970), slp. op.; Davis 765. Further, as the D.C. Court of Appeals recently stated in *Ackerly* v. *Ley*, —— F.2d —— (D.C. Cir. 22,665, Dec. 19, 1969) Slip op.: ". . . And the fact that appellant might, presumably by a combination of intuition and diligent research, ferret out some of the materials relied upon is surely no reason to suppose that Congress made revelation under the Freedom of Information Act contingent upon a showing of exhaustion of one's own ingenuity." *Id.* at 10.

than a copy of the Advice Branch or Office of Appeals' sterile form letter which, in conclusionary terms, merely states that litigation is not deemed warranted. What the public requires is access to any document embodying the operative facts and underlying rationale which constitutes the basis for the General Counsel's final determination not to proceed. Your Committee believes a digest of such opinions should be published in order for the public to be in a position to make a "request for identifiable [Advice and Appeals] records," (§ 552(a)(3)) and that the Board must develop an index which will realistically permit the public to meaningfully formulate its requests and identify the materials sought.[4]

Your Committee believes its position is strengthened by the recent decisions of courts of appeals in dealing with questions arising under the Freedom of Information Act. A review of the litigation generally discloses that while the District Courts have been inclined to accept government arguments against disclosure, the courts of appeals have, contrary thereto, given broad reading to the affirmative provisions of the Act, counseling for disclosure and requiring the agency asserting a privilege to convincingly demonstrate that a particular document falls within one of the statutory exemptions.[5] Thus, your Committee does not believe that the Board is on solid ground when it asserts, without explication, that *Advice and Appeals Memoranda* are privileged under the "intra-agency" memorandum exemption appearing in § 552(b)(5) of the Freedom of Information Act. For example, in *American Mail Line Ltd.* v. *Gulick*, 411 F.2d 696 (D.C. Cir. 1969), the Maritime Subsidy Board an-

[4] On January 31, 1970, the Department of Labor amended its regulations dealing with its responsibilities under the Freedom of Information Act, *inter alia*, by providing for the particularized delegation of authority to agency personnel to prepare and promulgate indices. LRX 3003, pt. 70, and Section 70.5 in particular.

[5] *Bristol Myers Co.* v. *F.T.C.*, —— F.2d —— (D.C. Cir. 22,277, March 26, 1970) slip. op.; *Ackerly* v. *Ley*, —— F.2d —— (D.C. Cir. 22,665, December 19, 1969) slip. op.; *General Services Administration* v. *Benson*, 415 F.2d 878 (9th Cir. 1969); *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board*, —— F.2d —— (D.C. Cir. 22,277, March 26, 1970) slip. op.; *Consumers Union* v. *Veterans Administration*, 301 F.Supp. 796 (S.D. N.Y. 1969).

nounced that it was ordering three million dollars worth of subsidy refunds on the basis of an *agency memorandum* supporting a finding that the ships were carrying unnecessaily large crews. When the order was issued, the Board attached the last five pages of the Memorandum but refused to comply with the plaintiff's request for the production of the balance of the Memorandum on the ground that, under the "intra-agency memorandum" exemptions expressed in § 552(b)(5) of the Act, the withheld portions were privileged. The Court of Appeals, in rejecting the government's contention, noted that the Memorandum served as the basis for the Board's final determination and order, and therefore held that the entire Memorandum was a public record and that the Freedom of Information Act required the Subsidy Board to disclose the full and rationalized basis for that Agency's action *in its entirety*. Your Committee believes that a parity of reasoning would require no less from the NLRB in dealing with the instant subject.

Your Committee recognizes that compliance with its request will necessarily occasion additional "administrative" work for the NLRB. Approximately 1,400 appeals are handled by the General Counsel's Office of Appeals each year; the workload of the Advice Branch is similarly voluminous. For the NLRB to comply with the requirements of the Freedom of Information Act and the requests of your Committee made pursuant thereto competent personnel and additional funds would have to be earmarked for this endeavor. However, your Committee believes the Board's obligations under the Freedom of Information Act cannot be indefinitely delayed and that, in accordance with Congressional will expressed in the Act, the Board should immediately undertake the preparation of an index and other suitable procedures for public access to the *Advice and Appeals Memoranda*.[6]

[6] Setting aside semantic discussion over whether the Board presently has a "Book of Digests" as described by Professor Davis, or some other orderly filing and indexing system whereby personnel on the Appeals and Advice staffs may gain access to accumulated decisions, recommendations, policy statements, etc., it is clear that the preparation of an index would assist (in addition to the public), those agency personnel who *should be* considering what past actions have been taken by the Office of the General Counsel.

7. CONCLUSION

Your Committee is of the view that the continuing dialogue between it and the NLRB's Liaison Committee has produced significant results. As noted, the expansion of the *Field Manual*, the availability to the public of both the *Litigation* and *Trial Examiner's Manuals*, and the joint efforts to arrive at common understanding regarding disclosure of other materials demonstrates that, over a period of time, progress does flow from the reasoned exchange of ideas and opinions.

There is, nevertheless, a need for further expansion of "Government policy and attitude toward disclosure of information."[7] Your Committee believes that the Board should reconsider its previous decision which results in the restricted use of the *Litigation Manual* to Regional Office libraries. The *Trial Examiner's Manual* should also be made available to all members of the public on an equal basis. We further believe that, notwithstanding recognized limitations on staff and budget, the Board should immediately undertake the preparation of an index of previously unpublished material, commence to publish digests of appeals and advice cases, as well as an index and availability file of Advice Branch and Office of Appeals Memoranda. To these ends your Committee believes that full cooperation and assistance through Committee personnel should be offered to the Board for whatever advisory or other purpose its members might perform.

[7] "A reading of the [Freedom of Information] act and its legislative history indicates that it was Congress' overriding concern that disclosure be the general rule, not the exception; that all individuals have equal rights of access; that the burden be on the agency to justify the withholding of a document, and not the person who requests it; that individuals improperly denied access to the documents have a right to seek injunctive relief in the courts' and that there be a change in Government policy and attitude toward disclosure of information." Staff of Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess., "The Freedom of Information Act" (Ten Months Review) 3 (Comm. Print 1968).

EXHIBIT 2

PROCEDURE UNDER THE NATIONAL LABOR RELATIONS ACT 233 (1971)

5. ADVICE AND APPEALS MEMORANDA AND INDICES THEREOF

Last year your Committee requested that all decisions of the General Counsel resulting in his refusal to issue a complaint be made public, and that an index of all such decisions and advice or appeals memoranda supporting such decision, also be made available to the public. To establish the statutory and legal basis for your Committee's request, the 1970 Committee Report, Vol. 2, pp. 6-9, detailed the applicable provisions of the Freedom of Information Act, 5 U.S.C. § 552(a)(2)(A), (B) and (C), as well as analogous judicial authority.

This year, your Committee continued to press for an orderly and meaningful index for advice and appeal memoranda reflecting final agency action in cases where complaint is not issued. The representatives of the General Counsel took issue with the statement of Professor Davis in his book, *Discretionary Justice* (p. 206), disclaiming the existence of a "book of digests" which Professor Davis described as an index of decisions from the Advice Branch and Office of Appeals. The General Counsel's representatives asserted that the Advice Branch and Office of Appeals do not prepare memoranda of the character held to be subject to disclosure under the Act,[1] or an index thereof.

With regard to advice functions, it is noted that when a case is referred by the Regional Office to Washington for advice, a separate file for that case is opened by the Advice Branch. This advice file includes the Region's request for advice, the memorandum prepared by the

[1] This position was also asserted formally in an agency letter of February 27, 1970, to Professor Davis of the University of Chicago. But note, the letter to Professor Davis further asserted: ". . . however, a set of [memoranda] is retained by the Advice Branch, classified and filed according to the issues raised in each case. . . ."

Advice attorney for consideration at the "agenda," the memorandum prepared at the conclusion of the "agenda," together with the memorandum returning the case to the Region. The advice file will also contain memoranda reflecting post-complaint matters or other subsequent advice rendered in the case, if any. With regard to appeals cases submitted to Washington upon a Regional Director's refusal to issue complaint, the previously described procedures and functions are essentially the same.

Thus, notwithstanding the fact that pertinent and issue-controlling memoranda do exist and either are indexed or "classified," or can be indexed and digested in an orderly manner, the General Counsel has taken the position that the only document disclosable under the Freedom of Information Act is the letter from the Regional Director or the Office of Appeals advising the charging party (or appellant) that the issuance of complaint does not appear warranted. And even as to these letters, the General Counsel asserted that the Freedom of Information Act does not require either the indexing of dismissal letters or its making public of the "classification," *supra*. In support of this assertion, the Liaison Committee took the position that the only material required to be indexed was that which was relied upon and cited as a precedent. Since refusals to issue complaint are not so cited, and, according to the Liaison Committee, are not even made available to regions other than in the region in which the case originates, it rejected the notion that a statutory obligation for indexing existed. Finally, while acknowledging that an index would serve a useful purpose within the agency itself, the Liaison Committee indicated that under present restrictions on its budget and with limited manpower, the NLRB could not, even as a matter of accommodation, comply with your Committee's request for the preparation of a meaningful index.

In the *1970 Report of the Section of Labor Relations Law*, Vol. II, p. 7, n.2, your Committee drew an analogy between the function of the advice and appeals memoranda and the "no-action" letters prepared by staff personnel of the Securities and Exchange Commission, not-

ing that the SEC's "no-action" letters and memoranda indicate that on the basis of submitted facts and applicable law and rationale, "no [legal] action" will be taken. As your Committee there reported, "the Administrative Law Conference of the United States during June 1970, 'overwhelmingly approved a recommendation that the [SEC] publish "no-action" letters issued by the SEC or its staff.' 38 L.W. 2657, 2658."

Since last year's report, the SEC has taken affirmative action to comply with the Conference's recommendation. Thus, on July 14, 1970, the SEC issued a Notice of Proposal to change Section 200.81 (17 C.F.R. 200.81) concerning public availability of requests for no-action and interpretative letters and the responses thereto by the Commission's staff. Thereafter, on October 29, 1970, the Commission issued a release indicating its adoption of changes which were based upon comments received from members of the Bar and the public. The new section and procedures, which became effective on December 1, 1970, provide, in part, that "no-action and interpretative letters and the responses thereto will be available for inspection or copying thirty days after the staff has given or sent the responses to the person requesting it." Under this procedure, *all* such letters and interpretations will be deemed available to members of the public, and exceptions will be allowed for a delay "not exceeding ninety days after the expiration of such thirty days" where sufficient considerations can be presented to justify agency discretion in according confidential treatment to the specific material. In such cases, the burden shall be upon the individual requesting confidential treatment to "clearly show" the basis therefor, and where confidential treatment is accorded it will be "limited to the minimum period necessary under the circumstances," but in no event beyond the 90-day period.

Further, the SEC contemplates that "from time to time where the subject matter of a no-action or interpretative letter is of particular interest or importance, such letter and response thereto will be published in summarized form in the Commission's daily News Digest. This will call attention to the position taken in the staff's

response and interested persons can, if they so desire, inspect the full text of the letter and response thereto in the public file." As the foregoing provision makes clear, the SEC has already adopted and incorporated in its rules a position which your Committee has repeatedly urged upon the General Counsel. Thus, your Committee has urged that all advice and appeals memoranda and decisions be made available to the public and that significant decisions or rulings which warrant special circulation and broad coverage be circulated by the General Counsel either in the weekly summary of developments or in the quarterly report of the General Counsel on case handling. This would then alert the public as to the more significant developments, thereby providing the Labor Relations Law Bar with better insight and guidance regarding matters falling under the jurisdiction of the General Counsel's office.

Finally, the SEC adopted what is tantamount to an "index" system to facilitate access by members of the Bar and the public to the particular statutory ruling or provision involved. The "indexing" provisions appear as a "Note" to Section 201.81(b) of the Rules and the SEC, on January 25, 1971, adopted specific procedures applicable to requests for no-action or interpretative letters. The specific provision of the "Note" in Section 201.8(b) requires that all requests for interpretative advice or no-action positions "shall indicate prominently, in a separate caption at the beginning of the request, each section of the Act and each rule to which the request relates." In commenting on this provision, the SEC has stated that comments from the Bar and the public with regard to the proposed rule "indicated concern that the requests and responses thereto should be available *in a form* which will facilitate reference to those relating to a particular section or rule. Cooperation of the Bar and other persons in complying with the note to paragraph (b) will aid in accomplishing this result." (Emphasis added). Here again, your Committee would urge the NLRB to devise a comparable, meaningful "index" or other retrieval system whereby members of the Bar would be in a position to have advice and appeal memoranda and decisions

"available in a form which will facilitate reference to those relating to a particular section or rule" or other topical basis.

Your Committee fully comprehends the Board's budgetary and manpower limitations. But, as previously noted, notwithstanding similar limitations on manpower and budget, the Securities and Exchange Commission has responded to a similar and long-pressed need of its practitioners (and the public at large) by taking the initiative in making its corpus of Agency no-action developments available to the public, and developing meaningful "indexing" procedures so access will be enhanced. Surely the NLRB is at least as flexible and resourceful as other governmental agencies in devising ways to give substance to its obligations under the Freedom of Information Act, notwithstanding ever present limitations on time, money and manpower.

As will appear, *infra*, the Board has been engaged in litigation under the Freedom of Information Act and, understandably, it may be reluctant to make concessions which might adversely affect its legal posture in pending cases. However, your Committee has not been apprised of any pending or contemplated cases which involve, or would be affected by, the Board's compliance with your Committee's request for advice and appeal memoranda and indices. Whether viewed as a research tool, or as the only source of relevant law on a particular administrative issue, the fact remains that the General Counsel's decisions not to issue a complaint do, in fact, constitute final agency action and, as aptly phrased by Professor Davis, in many areas "[such] General Counsel's decisions constitute the only relevant law. . . ." Accordingly, your Committee shall continue to vigorously urge the Board to recede from its position and undertake the publication of whatever index or "classification" which may exist, as well as the preparation of an index, and to make available to the public copies of advice and appeal memoranda and decisions in cases where the General Counsel declines to issue a complaint.

6. NLRB—FIA LITIGATION

The NLRB has been directly involved in litigation arising under the Freedom of Information Act in the following 7 cases:

1. *Pavone* v. *Kennedy* (C.D. Cal., Case No. 67-1181-WPG, 1968) (unreported).

This case involved an effort by plaintiff to obtain from the NLRB the names and addresses of employers against whom charges or election petitions were filed in order to use the information as a business solicitation source. The suit was dismissed by the court upon a docket entry with no formal order appearing. We are informed that the Board now makes available such information in its Regional Offices.

2. *Local Union No. 560, IBTCHWA* v. *N.L.R.B.* (D. N.J., Case No. 46-68, 1968) (unreported).

Plaintiff union had been charged with violating § 8(b)(3) of the Act and a companion suit had been instituted under § 301, charging the union with violation of a no-strike clause. In this litigation, the union brought suit to compel the Board to turn over an affidavit obtained by a Board agent during the investigation of the 8(b)(3) charge. The court accepted the Board's argument that the affidavit was privileged under exemption (7) of the Freedom of Information Act, as it was part of an "investigatory file compiled for law enforcement purposes." The suit was dismissed upon a docket entry, with no formal order appearing.

3. *Government Employees' Insurance Co.* v. *McLeod*, 96 LRRM 2186 (S.D.N.Y., 1968).

In this proceeding the employer sought a preliminary injunction restraining the NLRB from conducting a representation hearing.

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III

PROCEDURES OF THE GENERAL COUNSEL'S OFFICE OF APPEALS AND THE REGIONAL ADVICE BRANCH

This year your Committee continued its conference with the Liaison Committee regarding the operations and procedures of the Office of Appeals and the Regional Advice Branch. The following constitutes the report of your Committee's study and conference.

1. THE REGIONAL ADVICE BRANCH

It is the responsibility of the Advice Branch to analyze and interpret Board and Court decisions to determine areas of the law which are unclear or in a state of flux and to assist the General Counsel in considering and selecting cases which may give direction to the law in those, as well as new or novel areas.[3]

In discharging its responsibility, Regional Directors are advised with respect to the issuance of complaints in particular types of cases. Advice also "follows-up" on cases submitted to it. It reviews complaints, analyzes Trial Examiners' decisions dealing with the issues on which advice was given, assists in preparing briefs to the Trial Examiner, and provides exceptions, briefs and oral argument to the Board.[4]

A. *Operations of Advice Branch*

Matters come to the attention of Advice essentially in 2 ways: (1) standing instructions are issued to the Regions to automatically submit certain types of cases

[3] The General Counsel holds the view that the Office of Advice serves a purely internal agency function of assisting in policy decisions and maintaining uniformity of administration in the field.

[4] However, in cases involving § 10(1) relief, Regional Directors seek "advice" from the District Court Section of the Division of Law, and "advice" in cases involving § 10(j); and § 10(c) relief is sought from the Enforcement Section.

or certain issues; (2) Regional Directors may, at their discretion, solicit advice on any case or issue.

Those matters which must be submitted for Advice are set forth in the "non-public" Field Manual maintained at the Regional Offices and supplemented from time to time by the General Counsel's Office in Washington. The General Counsel disclosed the specific areas currently requiring mandatory submission to Advice, and agreed to update this information in subsequent issues of the Quarterly Report on Case Developments.[5]

In any case in which advice is sought, the Regional Office submits its file together with a summary of the evidence, a listing of the issues, and the Region's recommendation for disposition of the case. (Any difference of opinion within the Region may be noted). In Advice, the case is assigned to an attorney and his supervisor for review, research and analysis. Parties to a case have the opportunity, upon request, to orally present their position to the Office of Advice. There are few such oral presentations, but where granted, other parties

[5] The General Counsel advised your Committee that the areas where submissions for Advice are currently required were those set forth in his Quarterly Report on Case Developments released January 26, 1968, which listed as areas of then current advice interest: lockouts; the impact of *Wiley* v. *Livingston*; a union's duty of fair representation under *Vaca* v. *Sipes* and *Miranda*; union fines; the effect of *National Woodworkers* on Section 8(e) issues; and the implications of *Pennington* and *Jewel Tea*.

In the General Counsel's most recent Quarterly Report on Case Developments (covering the period ending March 31, 1971) the following items appear to be of current "advice" interest: whether a union violates Section 8(b)(3) by insisting upon arbitration of a grievance relating to the scope of the unit despite a Board unit determination to the contrary; whether a union violates Section 8(b)(1)(A) by fining a member for instituting a civil action under Section 301 without exhausting internal union procedures; whether an employer violates Section 8(a)(5) by proposing a contract provision which would permit the employer to withdraw recognition from the incumbent union in the event it fails to achieve certification in the then-pending representation proceding; and whether an employer violates Section 8(a)(1), (3) and (5) by refusing to modify a practice, supported by provisions of the collective bargaining agreement, which permits discrimination in employment based upon sex.

having interest are notified and afforded an equal opportunity. Thereafter, analysis and recommendations are presented by written memoranda and, on occasion, orally to what is termed the "Agenda." The "Agenda" consists of the members of Advice who prepared the case, the Branch Chief, the General Counsel's Special Assistant, and such other members of the General Counsel's staff as the case may warrant. In more important cases, a "General Counsel's Agenda" is held, i.e., one in which the General Counsel personally participates.

At the Agenda, a final decision is usually reached. The theory on which the determination is based could be the theory or theories advanced by the Region, the minority in the Region, one of the parties in interest, or a theory developed independently by Advice. An Advice memorandum setting forth the precedents, theories and analyses supporting the determination is prepared. The General Counsel indicated that, on occasion, the Advice memorandum will specifically refer to a prior Advice memorandum on the same subject. The General Counsel alleged that such reference was not construed to give any precedential effect to the prior Advice memorandum; rather, he alleged it was a time-saving device whereby, when the Office of Advice will have submitted an exceptionally detailed and thorough analysis of a particular case, it facilitates matters to simply refer to that prior memorandum.[6]

B. *Notice to Parties of Referral to the Advice Branch*

The General Counsel stated that it was not the policy of his office for either Advice or the Regional Office to

[6] The example given was the *Pittsburgh Plate Glass Co.* case, involving retired employees and their status *vis-à-vis* collective bargaining obligations of an employer. In handling questions involving retirees, the Advice Branch would have responded to a Regional Director by referring to its prior analysis (in the *Pittsburgh Plate Glass Co.* case) and enclosing a copy thereof if the Regional Director had not already obtained such prior Advice memorandum. The General Counsel did indicate that Advice determinations in specific cases of general importance are at times distributed to all Regional Offices.

notify the parties in interest that a case has been submitted to Advice. He contended that such a policy would present too great an administrative burden. However, he emphasized that the Regional Director would, *upon request*, advise a party that a case had been submitted to Advice, but would not indicate the nature of the issue on which advice was sought.

Your Committee recommended that the General Counsel should adopt and promulgate a uniform rule that Regional Offices notify all parties when a case has been submitted to the Advice Branch. The General Counsel has formally rejected the request of your Committee as being neither desirable nor operationally feasible. Your Committee adheres to its view.

C. *Regional Action Based Upon the Advice Response*

The response to the Region from the Office of Advice sets forth a course of action to be followed by the Region: either issuance of a complaint absent settlement, dismissal of charges absent withdrawal, or further investigation. The Regions must follow the course outlined in this Advice response. The response to the Region will sometimes include specifics with respect to the kind of settlement or other action, and will set forth the theories upon which such course of action is based. The parties generally do not learn of the theories set forth in the advice response where the result is a withdrawal or settlement. Where the result is dismissal, the Region's letter may or may not restate the Advice response. However, in no instance will the reasoning or conclusion be identified as that of Advice. Where a complaint is issued based upon advice having been sought, the parties will discover the theories of the General Counsel in the course of the unfair labor practice hearing.

Your Committee recommended that the General Counsel should adopt a rule of uniform policy that any Advice memoranda of general application distributed to the various Regional Offices should be made available to the public. Your Committee's request was refused on the ground that these were privileged intra-agency memo-

randa and that, moreover, significant decisions of the Advice Branch are set forth in the Quarterly Report. Your Committee adheres to its view.

2. THE OFFICE OF APPEALS

The Office of Appeals, within the last year, changed its policy concerning oral presentations by parties.

In the past, oral argument had been granted upon request. It is now limited "to cases where it will tend materially to advance resolution of the issues." Criteria for determining under what circumstances oral argument will be granted are currently being formulated. Oral argument is currently being granted where the case presents novel or important issues of law or the facts are unusually complex. Since adoption of the policy, oral argument has been granted in 12 cases. No parties beyond those immediately involved in the case are advised of the cases or issues to be argued orally; however, the General Counsel anticipates that "most" cases which are argued orally will be the subject of discussion in one of his Quarterly Reports on Case Developments.

This year, your Committee discussed with the General Counsel specific practices involving appeals from formal settlement agreements. A formal settlement agreement is one usually entered into after issuance of a complaint and provides for the entry of a Board Order and consent that such Order may be enforced in the Court of Appeals. In cases involving unilateral formal settlements after the charging party has stated his objections, the matter is forwarded to the office of the General Counsel for review before submission to the Board for approval. The Rules do not provide for an "appeal" to the General Counsel. The appeal is to the Board prior to its approval of the proposed settlement. However, it is possible for a party to secure from the General Counsel an "operational review" of the proposed settlement. This "operational review" is similar in many respects to an appeal in that the party may, in addition to submitting written arguments, appear personally and argue orally before

the General Counsel prior to his approval or disapproval recommending such formal settlement to the Board.

The General Counsel, in discussing the operations of the Office of Appeals and the Advice Branch, noted that he viewed the 2 operations quite different conceptually. The General Counsel views the appeals, which exist by virtue of the Board's Rules, as part of a party's procedural process and, to that extent, the operations of the Office of Appeals are viewed as "public." The Advice Branch, on the other hand, is viewed by the General Counsel as serving a purely internal agency function designed to assist in making policy decisions and maintaining uniformity of administration in the field.

EXHIBIT 3

GENERAL COUNSEL'S MINUTE

Emhart Corporation
Case No. 1-CA-5727

Appeal from the Regional Director's refusal to issue an 8(a)(1) and (5) complaint based on a charge filed November 22, 1966, by UAW Local 326, alleging that the Company refused to supplement an existing collective-bargaining agreement in compliance with its obligation under a letter of agreement between the parties.

ACTION

Appeal denied.

REASONS FOR ACTION

Under all the circumstances, it could not be established that the refusal to grant the Union's request was for any reason other than the Company's good-faith interpretation of the terms of the supplemental agreement.

/s/ A. O.
Arnold Ordman
General Counsel

Dated: 1/24/67

EXHIBIT 4

GENERAL COUNSEL'S MINUTE

Diaz Drayage Company
Case No. 15-CA-2909

Appeal from the Regional Director's refusal to issue an 8(a)(1) and (5) complaint based on a charge filed September 6, 1966, by Local 270, IBT, alleging that since June 27, the Company refused to bargain with the Union.

ACTION

Appeal denied.

REASONS FOR ACTION

Under all the circumstances, including the ambiguous and self-contradictory language contained in the addenda, all of which related to contract duration, insufficient basis existed for a finding that the Company had acted in derogation of its statutory bargaining obligation in refusing to sign the contract proffered by the Union.

/s/ A. O.
Arnold Ordman
General Counsel

Dated: 4/26/67

EXHIBIT 5

GENERAL COUNSEL'S MINUTE

Technical Papers Division, Morart Plant, The Mead Corporation
(Dayton Local 60-P, Lithographers and Photoengravers Int'l. Union)
Case No. 9-CA-4362

Appeal from the Regional Director's refusal to issue an 8(a)(1) and (5) complaint based on a charge filed July 24, 1967, by Lithographers and Photoengravers International Union, alleging that the Company had refused to approve a collective bargaining agreement fully negotiated and agreed upon orally on June 9, 1967 between the Company and Union.

ACTION

Appeal denied.

REASONS FOR ACTION

The evidence established that the parties had agreed in principle to the terms of an agreement but there had been no meeting of the minds as to the language to be used when reducing the agreement to writing. Under the circumstances, insufficient basis existed for finding an unfair labor practice based upon the Company's refusal to execute the written contract submitted by the Union.

/s/ A. O.
Arnold Ordman
General Counsel

Dated: 11-1-67

EXHIBIT 6

GENERAL COUNSEL'S MINUTE

IUE Local 963
(Phelps Dodge Magnet Wire Corp.)
Case No. 25-CB-646

Appeal from the refusal to issue a complaint based on an 8(b)(1)(B) and (3) charge filed November 15, 1968 by Phelps Dodge Magnet Wire Corporation, alleging in substance that since about September 30, the Union has refused to bargain in good faith.[1]

ACTION

Appeal denied.

REASONS FOR ACTION

It was concluded, for substantially the reasons set forth in the summary report accompanying the Regional Director's dismissal letter of May 29, 1969, that further proceedings herein were unwarranted.

/s/ A. O.
Arnold Ordman
General Counsel

Dated: 8/20/69

EXHIBIT 7

GENERAL COUNSEL'S MINUTE

McIntosh Motors, Inc.
Case No. 17-CA-3183

Appeal from the Regional Director's refusal to issue complaint based upon an 8(a)(1) and (5) charge filed March 23, 1967, by IAM District 71, alleging that since December 22, 1966, the Company has refused to give effect to the provisions of a contract entered into with the Union July 29, 1966, and has otherwise refused to bargain in good faith with the Union.

ACTION

Appeal denied.

REASONS FOR ACTION

Under all the circumstances, including the evidence that the Company withdrew all authority from the Association to bargain for it both in 1963 and 1966, that the parties conducted separate negotiations for the 1963 contract, that the July 1966 letter of intent appeared to contemplate separate negotiations following conclusion of the Union's negotiations with the Association, and since the March 31 agreement on its face reflected that the parties had agreed to modifications of the Union-Association agreement, insufficient basis existed for a finding that the Company was bound by Association bargaining or the contract resulting therefrom. In these circumstances, the Company's failure to prepare a draft of the agreed-upon contract for the Union's signature was deemed insufficient to warrant further proceedings.

/s/ A. O.
Arnold Ordman
General Counsel

Dated: 7-21-67

EXHIBIT 8

GENERAL COUNSEL'S MINUTE

Iowa Conference of Teamsters and
Local No. 90 et al.
(Heavy-Highway Labor Relations
Council of Iowa)
Cases Nos. 18-CC-251
18-CB-314

Appeal from the refusal to issue an 8(b)(3), and 8(b)(4)(ii)(A) and (B) complaint based on charges filed June 24, 1968, by the Heavy-Highway Labor Relations Council of Iowa, alleging respectively that the Iowa Conference of Teamsters and its local affiliates have refused to execute the Heavy and Highway Construction Agreement for the State of Iowa; attempted to withdraw from multi-union and employer association negotiations in order to obtain terms contrary to the negotiated agreement; insisted on negotiation of matters not proper subjects for bargaining; withdrew proposals made by them and accepted by the association; and coerced the Council to cease doing business with other persons and enter into an agreement prohibited by Section 8(e) of the Act.[1]

ACTION

Appeal denied.

REASONS FOR ACTION

Under all the circumstances, including the provisions on page 10 of the draft agreement for the parties' individual acceptance thereof, it could not be established that there was a multi-employer bargaining unit or that the spokesmen for the Heavy Highway Labor Relations Council and the Union at the negotiations had the authority to bind any of the individual Companies or Unions to any agreement reached by Hoffman and Rowley in their negotiations. Therefore, the burden could not be met of

showing that Teamsters' refusal to execute the written contract incorporating the agreement allegedly reached between Hoffman and Rowley, and its submission of proposals which would detract from provisions already agreed upon, violated the Act. Nor did the evidence indicate that the Union negotiators had insisted to impasse that any particular nonmandatory bargaining proposal be accepted by the Council. With regard to the alleged 8(b)(4)(ii)(A) and (B) conduct, there was no evidence of threats, coercion or restraint on the part of the Teamsters. Accordingly, further proceedings were deemed unwarranted.

/s/ A. O.
Arnold Ordman
General Counsel

EXHIBIT 9

GENERAL COUNSEL'S MINUTE

Detroit Newspaper Publishers Assn.
The Detroit News, Detroit Free Press; Detroit Mailers Union No. 40, ITU
Case Nos. 7-CA-6916-1-3
7-CB-1818-1-3

Appeal from the refusal to issue 8(a)(1)(A) and (3) and 8(b)(1)(A) and (2) complaints based on charges filed August 19, 1968, by Joe Wellman, John Rahie (individuals) and Detroit Mailers Union No. 4, IMU, alleging in substance that the Newspaper Assn. (acting on behalf of its members) and the ITU have agreed to a pension plan in which participation is dependent on membership in the ITU, thereby discriminating against nonmembers and interfering in the employees' exercise of their Section 7 rights.

ACTION

Appeal denied.

REASONS FOR ACTION

In view of the attached amendment to the ITU Negotiated Pension Plan, further proceedings herein would not effectuate the policies of the Act.

/s/ A. O.
Arnold Ordman
General Counsel

Date: 11/14/69

AMENDMENT OF PAST SERVICE CREDIT PROVISIONS OF ITU NEGOTIATED PENSION PLAN

RESOLVED, that Section 4.01 of Article IV of the ITU Negotiated Pension Plan be and the same hereby is amended, effective as of July 1, 1969, as follows:

The entire last paragraph of the section shall be deleted and, in place thereof, a new paragraph shall be substituted so that Section 4.01 in its entirety shall read as follows:

"Section 4.01 Past Service Credit

Past Service Credit shall be given to a Participant for each month of his continuous full time employment as a journeyman during the period immediately prior to his Applicable Effective Date, computed to the nearest whole month, provided such period of continuous full time employment began prior to January 1, 1967. The total of the months so credited shall be divided by twelve to obtain years of past service. No Participant shall be eligible for Past Service Credit who, prior to becoming a Participant, received any pension payment pursuant to Article XX, ITU By-laws.

If, in the opinion of the Trustees, the granting of Past Service Credit in a given situation would adversely affect the actuarial reserves of the Plan, they shall, by rules uniformly applicable to all persons similarly situated, reduce the amount of Past Service Credit granted."

EXHIBIT 10

This Section 8(a)(5) case was submitted for advice because it involved a novel question of law concerning a union's withdrawal from multi-union, multi-employer bargaining.

It was concluded that further proceedings on the charge filed by the Union are unwarranted, since the Employer was in the circumstances considered to be privileged in refusing to bargain separately with the Union and in reaching an agreement with the multi-union group, which agreement covered, *inter alia*, the Union, over the Union's protests that it had withdrawn from the multi-union bargaining.

The bargaining history and language of the two previous contracts were viewed as establishing a multi-union, multi-employer bargaining relationship, in which the individual locals of the Union's International Union as well as the International Union and the Negotiating Committee, constituted a joint representative of the employees in a merged unit. In this regard, it was noted that in 1965 a multi-union multi-employer Western States contract was negotiated by a committee consisting of representatives from several locals and from the International Union. The contract was approved by a majority of votes of all covered employees in the overall multi-union multi-employer unit. Although the Union did not directly participate in these joint negotiations and refused to execute the Western States agreement because of dissatisfaction with the agreement among its members, the contract was executed for and in behalf of the Union by an International Union representative and was put into effect in the territorial jurisdiction of the Union without objection from the Union. In 1968, at the request of the Union, a business representative of the Union was appointed to the multi-union negotiating committee, participated in the negotiations and signed the contract as a member of the union negotiating committee. And despite the apparent dissatisfaction with the agreement and the local supplement among members of the Union,

representatives of the Union signed the local supplement as well, because a majority of employees in the overall multi-union multi-employer unit had approved the supplements. Finally, the agreements state that the "Union" consists of the Union International and its affiliated locals party to the agreement, and are signed by the Union International and by the Negotiating Committee of the Union International, for and on behalf of numerous local and districts, including the Union.

Based on the foregoing, it was concluded that a multi-union multi-employer bargaining relationship existed and that the individual locals of the Union's International, including the Union, constituted the joint representative of the employees in a multi-employer unit at the time the Union attempted to withdraw from multi-union bargaining. In such circumstances of multi-union bargaining and joint representation, the *Retail Associates*[1] principle involving withdrawal from *multi-employer* bargaining by timely notice was considered inapplicable. Rather, where units represented by various labor organizations have been merged by consent and the unions represent the employees and bargain jointly for the overall unit, the *filing of a timely petition* was considered to be the appropriate course for a constituent union seeking withdrawal from the multi-union group.

Thus, with respect to withdrawal from multi-union bargaining, the Board stated in *Evening News Association*, 154 NLRB 1494, 1498:

> . . . in multiunion bargaining, once a broad unit has been established by consent, one of the constituent unions could not generally change the unit by unilateral action;[13] but neither would the employer be permitted to do so. A similar situation exists with respect to single-employer, multiplant units. In these types of cases, employer and union are treated alike. Neither can break up the unit.

[13] This is generally but not always true. One of the constituent unions could sever a segment of the broader unit, *if it filed a petition with the Board at an appropriate time*, and if the smaller unit were otherwise appropriate. (Emphasis supplied.)

[1] *Retail Associates, Inc.*, 120 NLRB 388.

And the decisions in *American Pipe and Construction Co.*, 169 NLRB 1024 and *United Metal Trades Association*, 172 NLRB No. 52, support the view taken here that in multi-union bargaining mere timely notice of a desire to withdraw will not suffice to sever the union from the multi-union group.[2]

In view of the above, the Union's attempt to withdraw from multi-union bargaining by giving timely notice to all parties, but without filing a petition, was considered ineffective. And where, as here, the unions involved have followed the historical method of contract negotiation and ratification and the Employer has been notified by the unions that such ratification has taken place, the Employer was considered privileged in relying on the ratification[3] and in executing the current agreement covering the Union with the multi-union group.

Accordingly, the charge should be dismissed, absent withdrawal.

G.B.

ROF-1

[2] In the cited cases, the Board indicated that a union did not have an automatic right to withdraw from multi-union bargaining on the same terms as an employer may withdraw from multi-employer bargaining, but rather that any right of a union to withdraw from multi-union bargaining would be contingent, at least, on the appropriateness of the separate unit sought by the union.

[3] Cf. *M & M Oldsmobile, Inc.*, 156 NLRB 903, at pp. 905-906.

EXHIBIT 11

This confirms telephonic authorization of January 7, 1971 to issue 8(b)(3) complaint to place issue before Board and to dismiss 8(a)(5) charge.

With respect to 8(b)(3) charge, concluded in agreement with Region that prior to 1970 parties had negotiated in multiemployer unit consisting of all linen suppliers in city except for companies A and B. Also noted that this multiemployer group negotiated 1967 agreement and none of employers in group withdrew from bargaining on multiemployer basis. Further concluded that Union failed to unequivocally withdraw from multiemployer unit prior to actual beginning of negotiations on November 12, 1970. In this regard, Union statements of November 12, 1970 considered equivocal since Union never clearly stated it was withdrawing from bargaining on group basis but demanded that bargaining be conducted in same way as it had been in past, which, as concluded above, was on a multiemployer basis. Also noted that in past Union considered bargaining to be on multiemployer basis. Union's reservation of position on November 12, 1970 not considered to make Union withdrawal of December 7, 1970 timely because Union only reserved right to bargain as in past, viz., without association participation, Union did not reserve right to bargain individually.

In circumstances Union considered as refusing to bargain with employer group through association. And this refusal not viewed as privileged since it was not unequivocal withdrawal from bargaining on established multiemployer union basis and formation of association had not changed unit.

Fact that association letter of November 6, 1970 referred to only nine employers not considered to warrant contrary result. Affidavits show that as of beginning of actual negotiations on November 12, association had been designated in some form as representative for bargaining by all employers in historical multiemployer unit. Union never claimed to be confused by letter of November 6, 1970 as to number of employers in bargaining group

and did not raise that as reason for refusal to bargain on multiemployer basis. And, by meeting of November 24, 1970, any arguable defect in employer's request for bargaining considered cured since association at that time indicated to Union that it represented all employees in historical multiemployer unit.

In addition, strike considered 8(b)(3) violation to extent that it was in support of Union's unprivileged position.

In light of above, employer's responsive lockout would be privileged and association's demand for bargaining only on group basis also considered privileged. Accordingly, further proceedings on Section 8(a)(3) and 8(a)(5) charge, deemed unwarranted. With respect to 8(a)(3) allegation in charges filed December 30, 1970, Region may proceed at its discretion.

Two ROFs are being returned under separate cover.

Gerald Brissman
Assistant General Counsel

1/8/71—11:10 am

5750

EXHIBIT 12

Consideration was given to the contract provisions in the Master Agreement submitted by the Region with its memorandum of February 23, 1968. It was concluded that the Region should proceed in accordance with the initial Advice authorization dated February 16, 1968.

G. B.

ROF-1

In all the circumstances, it was concluded, in accordance with the Region's recommendation, that the 8(a)(5) charge should be dismissed, absent withdrawal. In agreement with the Region, the Employer's withdrawal from the multi-employer association of May 8, 1967, was considered timely, even though it occurred after the Union's March 15, 1967, notice to open the contract, since it was made substantially before a date was set to begin negotiations for a new contract.[1]

G. B.

ROF-1

[1] See *Evening News Association, Inc.*, 154 NLRB 1494, at 1495; *Retail Associates, Inc.*, 120 NLRB 388, at 395. It was also noted that the Union considered the withdrawal on April 16, 1967 by another member of the association to be timely despite the fact that this withdrawal also occurred after the Union's notice to open the contract.

EXHIBIT 13

COLE, ZYLSTRA & RAYWID
Attorneys at Law
2011 Eye Street, N.W.
Washington, D.C. 20006

Area Code 202
659-9750

Cable Address
"Czar"

March 1, 1972

Peter Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D.C.

Re: Sears, Roebuck and Co. v. National Labor Relations Board, United States District Court for the District of Columbia, Civil Action No. 1571-71 and Retail Clerks Union, Local 4, Retail Clerks International Association, AFL-CIO and Sears, Roebuck and Co. Case No. 19-CB-1673

Dear Mr. Nash:

As you know, the undersigned has been continuously engaged for the past two weeks in reviewing Appeals Memoranda or decisions deemed essential to charging party's preparation in Board Case No. 19-CB-1673, now scheduled for hearing on April 6, 1972. Because an appeals index is not yet available, it has been necessary to review each of these memoranda to identify those which, like Case No. 19-CB-1673, involve issues relevant to the time limits of withdrawals multi-employer bargaining units. Despite our diligent efforts, however, we have to date only been able to sift through approximately 1,000 of the total estimated 8,000 cases to be made available to us. At this rate, it is estimated that it will be impossible to complete this review before the latter part of May or the first part of June. For that reason, and in view of the importance of these materials to our preparation, we have this date formally requested an extension

of the hearing to a date no earlier than June 5, 1972. A copy of the letter to the Regional Director requesting such postponement is attached hereto.

Such extension is also made necessary by the fact that a substantial percentage of the memoranda supplied to us are essentially unintelligible in their present form because of the lack of any description of the factual predicate constituting the basis for the decisions. Indeed, in the course of our review we have noted that most of the Appeals Memoranda merely indicate that the decision is based on the "circumstances of the case" without indicating what those facts or "circumstances" are. As a result, unless we are supplied with additional information disclosing the factual indicia for such determinations, such memoranda may be of little or no practical utility to our client or to the public generally.

For that reason, we recently requested that your representative make such underlying data and/or documentation forming the basis of such decisions available for public inspection and/or copying. This request was made with respect to those cases which, as a result of our review, appear to have particular pertinence to the issues involved in 19-CB-1673. This data will consist, for example, of collective bargaining agreements or similar documents upon which the memoranda relied in disposing of the case. In some instances we have noted that the memoranda rely upon the language of agreements without identifying the content of such language. Since none of this information can be considered of a confidential or privileged nature, we believe that we are entitled to such information or documentation pursuant to the Freedom of Information Act and Section 102.117 of the Board's Rules and Regulations. We therefore renew our request for such materials which your representative orally denied to us several days ago.

Because of the stricture imposed against us prohibiting any note taking during the course of our review, we cannot at this time supply you with a list of the particular cases for which such information and documentation is requested or the specific information required for each case. The particular cases involved, however, have already been flagged to your attention for reproduction and we assume that no such listing will be necessary. Furthermore, as soon as we have been supplied with copies of such memoranda, we will promptly identify the precise documentation or information needed.

In addition to the above described factual documentation, we also request copies of the underlying Regional Director's decision from which appeals have been taken, as well as the parties' briefs or arguments submitted in support of there position. We believe that the memoranda decisions can only be intelligently assessed in light of this supplemental data since, in some instances, the Appeals Memoranda simply constitute a summary affirmance of the Regional Director or make particular reference to the Director's ruling in supplying part of the basis for the appeals decision. Since Regional Directors' rulings have historically been submitted to both parties and have, therefore, been subject to public disclosure in the past, we can see no reason for withholding such rulings from us. With respect to the briefs or arguments, we believe that they could be of significant importance in shedding light on the ultimate decision reached, and therefore, such documents are also included within our request. Like the underlying Regional Directors' decisions, we can see no harm in disclosing the statements of position or arguments at this time since under the limitations imposed upon our review, the information requests are limited only to those cases where the litigation has been concluded or, if no complaint issued, to cases where no further action is contemplated.

To minimize the necessity of further delays beyond the requested June 5th date, we urge that the additional documentation and information as detailed above be supplied as promptly as possible.

If there are any logistical problems in obtaining these materials, we invite any suggestions which will help alleviate any further burden to your staff.

Very truly yours,

/s/ Jeffrey Goldman
Jeffrey Goldman
for Lederer, Fox and Grove

Enclosure

EXHIBIT 14

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
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March 14, 1972

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Shayle P. Fox
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K. Bruce Stickler
David L. Evans

Area Code 312
Telephone 641-0200

Peter G. Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Sears v. NLRB,
Board Case No. 19-CB-1673

Dear Mr. Nash:

After reviewing the index of Advice Memoranda, which I received today, I request copies of, or access to, the materials classified under the following rubrics:

44-33	66-54
66-50	66-56
66-51	68-53
66-53	

If there is any duplication with the Advice materials that we received earlier, I apologize; however, since I could not find classification numbers on these Advice Memoranda, it was impossible for me to determine what had, or had not, been already made available.

My client is prepared to assist you in resolving any logistical problem encountered in obtaining any of the material we have requested to date.

Again, I thank you for your assistance. I am

Respectfully yours,

/s/ Jeffrey S. Goldman
Jeffrey S. Goldman

EXHIBIT 15

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

April 11, 1972

Philip C. Lederer
Shayle P. Fox
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Jeffrey S. Goldman

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Telephone 641-0200

Peter G. Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Sears, Roebuck and Co. v. National Labor Relations Board, United States District Court for the District of Columbia, Civil Action No. 1571-71; and Retail Clerks Union, Local 4, Retail Clerks International Assn., AFL-CIO and Sears, Roebuck and Co., Case No. 19-CB-1673

Dear Mr. Nash:

Confirming my telephone conversation of today with Mr. Higgins, Associate General Counsel, it is my understanding that until March or April 1971, the Appeals Branch of the Board prepared and sent Memoranda (General Counsel Minutes) analyzing appeals cases to regional directors. In addition, a letter was sent to the

respective parties notifying them of action taken by the Appeals Branch.

Sometime during March or April 1971, the Appeals Branch eliminated the practice of sending the regional director a separate Memoranda; instead, the region was sent a copy of the letter sent to the parties explaining the Appeals Branch action. However, a separate Memoranda was still prepared and sent to the regional director in those instances where an appeal from a regional director's refusal to issue complaint was sustained.

In a conference on April 7, 1972, attended by Messrs. Cohen and Smetana, counsel for Sears, Roebuck and Co.; and Messrs. Bendixsen, Steele and Ms. Morris, attorneys for the Board, among other matters, there was a discussion and understanding as to the availability to Sears for inspection and copying of certain Office of Appeals documents, namely:

> Letters of the Appeals Branch sent to parties, and Memoranda sent to regional directors analyzing appeals cases.

In accordance with that understanding, my oral conversation of today with Mr. Higgins, and your letter of February 3, 1972 to Mr. Cohen declaring the letters to be public information and that the letters and memoranda would be made available to us, we hereby request that in each case where we have asked (and hereafter request) copies of certain General Counsel Minutes, that we also receive copies of both the letter sent to the parties by the Office of Appeals and the memoranda, if any, sent by the Appeals Branch to the regional directors analyzing appeal cases.

So that our review may be expedited, we urge that these materials be supplied as promptly as possible.

Very truly yours,

/s/ K. Bruce Stickler
K. Bruce Stickler
for Lederer, Fox and Grove

EXHIBIT 16

[Logo]

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 March 7, 1972

Mr. Jeffrey Goldman
for Lederer, Fox and Grove
c/o Cole, Zylstra & Raywid
Attorneys At Law
2011 Eye Street, NW
Washington, D.C. 20006

Re: Sears, Roebuck and Co. v. National Labor Relations Board, United States District Court for the District of Columbia, Civil Action No. 1571-71 and Retail Clerks Union, Local 4, Retail Clerks International Association, AFL-CIO and Sears, Roebuck and Co., Case No. 19-CB-1673

Dear Mr. Goldman:

This will acknowledge receipt of your letter of March 1, 1972, concerning the charging party's request for a postponement of the unfair labor practice hearing in the subject case from April 6, 1972, to June 5, 1972. I am advised that Regional Director Henderson has denied your request. For the reasons set forth below, I concur in Mr. Henderson's decision.

As I have previously indicated to members of your firm, I do not believe that the information being made available to you is of any precedential value or that it is necessary to the full presentation of any issues in Board Case No. 19-CB-1673, or to the full protection of your rights as a charging party. Accordingly, I see no reason further to delay the timely conclusion of this case by postponing the hearing until you have reviewed all of the documents. The documents have been available to your firm since February 16, 1972; and this Agency

has placed no restrictions on the firm's review of these memoranda which would delay the examination.

To the extent that your request for extension of time is based on your request for additional information, I would also deny it on the ground that assuming the documents were subject to disclosure the documents now requested were not encompassed within your original request. Thus, not only did you specifically state that you were "not requesting any of the investigatory files of the Board" but you specifically limited your request to materials generated by the Office of Appeals and the Advice Branch. Additionally, retrieval of the records involved would require locating the files at one of the various Federal Records Centers, a task which would involve a substantial expenditure of time and money. To postpone the unfair labor practice hearing until such a burdensome task had been completed would have the effect of postponing the hearing indefinitely, a result which is in direct opposition to the policy of timely resolution of unfair labor practice charges. Moreover, insofar as your request for postponement is predicated on the unavailability of Mr. Lederer, I note that he is not unavailable on April 6.

Your request for additional information from the investigatory files used in reaching the Office of Appeals decision is denied. The information you request was obtained from witnesses during the investigation of an unfair labor practice charge. These documents were obtained by the General Counsel on the understanding that the information and the identity of the person supplying the information would be kept confidential unless introduced into evidence at a hearing on an unfair labor practice complaint. Files compiled by the General Counsel during the investigation of unfair labor practice charges have long been held to be exempt from disclosure on the grounds that revelation of them would hamper the Board's ability to conduct investigations and secure information from individuals in the conduct of those investigations. The Freedom of Information Act preserves the Board's right to protect its processes by refusing to release such information.

You will note that two footnotes have been deleted from two of the Appeals memoranda that have been supplied to you and an explanation for this deletion is set forth on the memoranda itself. As the substituted footnote indicates in each instance, those notes related to intra-agency procedural instructions from the General Counsel to a subordinate regional official and are exempt from disclosure under the Freedom of Information Act. The deleted footnotes contain no factual or legal references, nor does the deletion affect the substance or continuity of the decision of the Office of Appeals. The statements contained in the deleted footnotes have no adverse effect on the public or upon the parties involved in the particular case. In the circumstances the Freedom of Information Act does not require that the information be published or made available.

Sincerely,

/s/ Peter G. Nash
Peter G. Nash
General Counsel

cc: Mr. Henderson, Director, Region 19

EXHIBIT 17

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

May 17, 1972

Philip C. Lederer
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Herbert M. Berman
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Area Code 312
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Peter Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20560

Re: Sears, Roebuck and Co. v. National Labor Relations Board, Civil Action No. 1671-71; and Retail Clerks Union, Local 4, Retail Clerks International Association AFL-CIO and Sears, Roebuck and Co., Case No. 19-CB-1673.

Dear Mr. Nash:

Confirming my recent telephone conversation with Mr. John Higgins, Associate General Counsel of the Board, this letter is to inform you of the present posture with respect to the gathering of information, inspection and analysis of such information pursuant to Sears' request under the Freedom of Information Act.

Since February 16, 1972, when you made available to Sears some of the information it had requested, the following has occurred:

1. We estimated that it would take, as a result of the absence of any indices, approximately two to three months to search through various Appeals and Advice Memoranda to extricate those materials pertinent to Case No. 19-CB-1673. This initial search was completed as of April 27, 1972.
2. In searching through the various materials, we requested copies of several hundred of documents. We have been provided with copies of most of these documents.
3. In some instances, where we have requested the copies of Memoranda, we have also requested underlying documentation necessary to make meaningful those documents. Such underlying documentation, we believe, will present factual circumstances that underlay the Board's holding in each case where an Advice or Appeal Memoranda has issued. Such underlying documentation will serve to fully explain the facts and circumstances surrounding the Memoranda. We need this material in order to effectively prepare for, participate in and develop a full and complete record in 19-CB-1673.
4. Moreover, our request for underlying documentation is predicated upon our belief that a party in our particular case, wherein the Board is proceeding on our behalf, should have all information necessary in order to know how to prepare for the hearing and develop the record to fully reflect our position in the trial, before the Board and in possible subsequent appeals.
5. We have also received various documents in a "sanitized" version. We have, of course, been unable to verify whether there has been a proper deletion of material. In various instances, as, e.g., where references are made to names of counsel (with whom contact would be valuable) or related cases, we believe the "sanitization" process is improper.

We will be happy to meet with you or your representatives at a mutually convenient date to attempt to resolve, short of litigation, the matters noted above. We are particularly concerned with the failure to provide essential underlying documentation. For example, one of the memoranda which we have been provided contains the following statement:

> "The appeal is denied essentially for the reasons stated in the Regional Director's letter of March 31, 1971. The investigation disclosed that the Union reopened the existing agreement with the Association for multi-employer negotiations by individual letters to each of the signatories dated December 27, 1970 and that these negotiations did not begin until on or about February 3, 1971. It further disclosed that on January 4, 1971, the Union received a letter from the Company which expressed its intention to 'negotiate the new Union contract to become effective March 1, 1971, separate and apart from the International Steel Fabricators Association'."

This memoranda seems to present factual and material issues directly material to the issues involved in Case No. 19-CB-1673. Nevertheless, without knowing the content of the contract between the Association and the Union, the Regional Director's letter of March 31, 1971, and the individual letters dated December 27, 1970, the relevance of this particular memoranda remains speculative insofar as providing us with a full and complete basis of the reasons for denial of the appeal.

Our case presents novel and complex questions dealing with, when "actual bargaining" begins, bargaining stability and freedom to contract and withdrawal from multi-employer bargaining. The above abstracted memoranda and its underlying documentation, for example, could be instrumental in determining how we prepare for trial. We need to know the contents of underlying documents referred to in the memoranda in order to compare them with the facts of our case, and determine what evidence we would hope to produce at trial. It is the absence of

Board or court precedent concerning the novel and complex questions to be raised at trial that will necessarily require both the Trial Examiner and the Board to re-examine, in light of the novel facts of our case, the underlying rationale of certain related Board decisions. The existence or nonexistence of certain facts contained in the underlying documents of requested memoranda, we believe, will serve to fully explain the underlying rationale of these prior related Board decisions.

Thus far, we have closely followed our projected time schedule and are now at a critical state of our investigation of those materials which you have made available. However, before we can make any effective analysis of the numerous documents involved, we must be supplied with the underlying documents in each instance where we have requested the same. If the Board disputes our right to such documents, then this matter must be immediately ascertained so that we may proceed accordingly.

When all the requested information has been made available to us, it is estimated that we would need approximately two weeks in order to fully inspect and analyze that information, and an additional two to three weeks to obtain witnesses and prepare a trial brief. For example, if the underlying documents and other requested materials as yet not received were made available to us by the end of next week, I would estimate that we could conclude our investigation and analysis of all the information and be ready for trial by the end of June. This is in accord with our original estimate and request for extension of time.

Very truly yours,

/s/ K. Bruce Stickler
K. BRUCE STICKLER
for Lederer, Fox and Grove

KBS/cl

[Caption omitted in Printing]

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND STAY OF PROCEEDINGS

Plaintiff Sears, Roebuck and Co., upon the attached affidavit and exhibits, moves this Court for a preliminary injunction ordering and directing Defendants to furnish forthwith the documents described in Plaintiff's Complaint for Declaratory Judgment and Injunction pursuant to the Freedom of Information Act, 5 USC 552, and which Defendants have answered will be voluntarily supplied, or alternatively, that the Court stay and enjoin Defendant National Labor Relations Board from further proceedings in Board Case No. 19-CB-1673, which is now pending before Defendant National Labor Relations Board and is scheduled for hearing on February 23, 1972.

The grounds for this motion as set forth in Plaintiff's Memoranda in Support of Motion for Preliminary Injunction are: (1) the sole ground for seeking the documents as stated in the Complaint was their use in assisting and preparing the action before the National Labor Relations Board; (2) Defendants have agreed to furnish these documents after extended delay in reaching such judgment and in answering the Complaint, but have nonetheless denied effective use of them by refusing to stay or postpone the proceedings before the Board until effective use could be made in preparation of the case before the Board; and (3) the Union, the party charged in the action before the Board, has consented to an extension until April 6, 1972.

Further, as set forth in the Memorandum, Plaintiff asserts that there is a substantial likelihood of success on the merits in view of the fact that Defendants have already agreed to furnish the documents, that refusal to stay the proceedings or to furnish the documents forthwith will cause irreparable injury to Plaintiff by denying effective use of the documents in its action before the Board, that there is no harm to either the Board or the respondent before the Board, since the Union has con-

sented to an extension of time, and that the public interest would be served by providing effective use of public records in the course of Board proceedings.

WHEREFORE, in view of the foregoing, Plaintiff prays that Defendants be ordered and directed to furnish the documents sought in the Complaint forthwith or, in the alternative or upon its failure to do so, that Defendants be ordered and directed to stay further proceedings in Board action 19-CB-1673 until 30 days after final delivery of the documents or conclusion of this action before the Court.

Respectfully submitted,

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OF COUNSEL:

COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

LEDERER, FOX & GROVE
111 West Washington Street
Chicago, Illinois 60602

February 11, 1972

AFFIDAVIT OF GERARD C. SMETANA

I, Gerard C. Smetana, hereby swear, depose and say:

1. At all times material herein, I have been and am now employed as Labor Relations Counsel for Sears, Roebuck & Co. (hereinafter called "Sears" or "Plaintiff") and am one of the attorneys of record in the proceeding now pending before the United States District Court in *Sears, Roebuck & Co., et al v. The National Labor Relations Board, et al*, docketed as Civil Action No. 1571-71.

2. On or about April 9, 1971, Plaintiff filed an unfair labor practice charge with the Regional Director of the Nineteenth Region of The National Labor Relations Board against Retail Clerks Union No. 4, Retails Clerks International Association, AFL-CIO, hereinafter "the union", in Case No. 19-CB-1673, alleging that by various acts and conduct that the union had violated and is violating Section 8(b)(3) of the Labor Act, and seeking issuance of the complaint by the Regional Director, acting for and on behalf of the General Counsel, against said union under Section 10 of said Act.

3. On or about April 23, 1971, the Regional Director referred the charge for disposition to the Advice Branch of the Office of the General Counsel in Washington, D.C. On or about June 10, 1971, and pursuant to mandatory instructions received from the Advice Branch in an *Advice Memoranda*, the Regional Director for the Nineteenth Region informed Plaintiff that he was refusing to issue a complaint with respect to the Unfair Labor Practice charges filed by Plaintiff in Case No. 19-CB-1673. He further notified Plaintiff of its right to seek further review of that determination before the Appeals Section of the Office of the General Counsel in Washington, D.C. pursuant to applicable rules and regulations of the Board. (A copy of the letter is attached and made a part hereof as Exhibit "A".)[1]

4. On or about July 14, 1971, Plaintiff, in order to perfect its right of appeal of the Regional Director's

[1] Exhibits A-Q were originally filed as attachments to the complaint with same identification.

determination in the Office of Appeals and acting under the Freedom of Information Act and in compliance with the applicable board rules, filed a request for information (hereinafter "request") with the Board through Defendant Goslee, who was then the acting General Counsel of the Board. In this request, Plaintiff requested that the Board, in accordance with the Freedom of Information Act, make available for public inspection and/or copying, the *Advice Memoranda* in Case No. 19-CB-1673 as well as other relevant advice and appeals memoranda, and the indices thereof, as more fully described in the request which is attached hereto and made part hereof as Exhibit "B".

5. On or about July 22, 1971, Defendant Goslee, on behalf of the Board, by teletype to Plaintiff, and confirmed by a letter of explanation dated the next day, refused to make available to Plaintiff any of the information sought in its request. (A copy of the teletype and letter are attached hereto and made a part hereof as Exhibits "C" and "D", respectively.)

6. On or about July 29, 1971, Plaintiff filed a renewed request for information (hereinafter "renewed request") with Defendant Goslee in which Plaintiff repeated its request for such information, clarified where necessary its request, and answered each of the reasons Goslee had proffered for denying the request, as more fully described in the renewed request attached hereto and made a part hereof as Exhibit "E".

7. On or about August 4, 1971, Defendant Goslee, by letter to Plaintiff, again refused to make available to Plaintiff any of the information sought in the renewed request. (A copy of that letter is attached hereto and made a part hereof as Exhibit "F".)

8. On or about August 4, 1971, Plaintiff commenced this action on its own behalf, and on behalf of others similarly situated pursuant to the Freedom of Information Act against the Board and its acting General Counsel, Goslee, to compel the disclosure of the information and materials within Defendant's possession which Defendant had denied to Plaintiff.

9. Pending disposition by the Court of said complaint, and in order to comply with the applicable time requirements of the Board's rules and regulations, Plaintiff filed under protest its Appeal in Case No. 19-CB-1673 with the Office of Appeals notwithstanding Defendant's refusal to make available to Plaintiff the information sought in its request and renewed request.

10. By letter of August 20, 1971, the Director of the Office of Appeals advised Plaintiff that its Appeal had been sustained and that the matter had been remanded to the Regional Director with instructions to issue an appropriate complaint on its behalf. (A copy of that letter is attached hereto and made a part hereof as Exhibit "G".) Pursuant to the mandatory instructions, the Regional Director did thereafter issue for and on behalf of the General Counsel a complaint against the union and scheduled a hearing on the complaint to commence on November 9, 1971, in Butte, Montana. (A copy of said complaint is attached hereto and made a part hereof as Exhibit "H".) In order to permit the parties sufficient time to attempt to settle the matter, or in lieu thereof, to attempt to reach a factual stipulation and thereby obviate the need for a hearing, the Regional Director did thereafter reschedule the hearing to January 26, 1972, at the same location.

11. Both prior to and following the filing of Plaintiff's amended complaint of October 14, 1971, in the instant proceeding, the undersigned was advised that the new General Counsel of the Board, Peter G. Nash, had ordered a complete review of the past practice and policy of the agency to refuse to disclose or make available the Memoranda and indices requested by Plaintiff and sought to be obtained in the pending litigation. As a result of such representations, Plaintiff stipulated with Defendants' counsel that Defendants' responsive pleading in the instant case could be deferred until December 3, 1971.

12. On November 30, 1971, Defendants' counsel filed a Motion for Extension of Time in which to file a responsive pleading and asserted in support thereof that the new General Counsel had "ordered a review of the refusal to disclose such information and is presently disposed to believe that he will make the information available." In that Motion, Defendants also asserted that

"the General Counsel expects that a complete and final review of the question of whether and how to make such information available will be made by the beginning of January". (A copy of the Motion is attached hereto and made a part hereof as Exhibit "I".) On December 1, 1971, Plaintiff filed its Opposition to the Motion for Extension of Time in which to file responsive pleadings in which Plaintiff noted, *inter alia*, that the hearing in Case No. 19-CB-1673 was then scheduled to commence on January 26, 1972, that the information sought in the present action was "directly relevant to, and could materially aid Plaintiff in preparation for, that case", and that without such information Plaintiff would be significantly hindered in effectively preparing for the hearing. (A copy of Plaintiff's Opposition is attached hereto and made a part hereof as Exhibit "J".) At the hearing on the Motion and Opposition thereto, held on January 21, 1972, the General Counsel's representative advised the Court that the General Counsel would divulge whether such information would be available and the extent thereof at a meeting of the American Bar Association Session on Labor Relations Law to be held on January 27, 1972. As a result of such disclosure, Plaintiff did not vigorously oppose the granting of Defendants' Motion for Extension of Time and the Court granted such extension to February 3, 1972. Plaintiff's counsel did, however, advise Defendants' counsel that assuming that such information was made available and depending on the nature and extent of the information, that Plaintiff might be required to seek a further extension in Case No. 19-CB-1673 so as to permit Plaintiff to have a full opportunity to review the data supplied in advance of the rescheduled February 23, 1972 hearing date. Plaintiff's counsel mailed a letter to Defendants' counsel dated January 21, 1972, confirming the events of that day and a copy of said letter is attached hereto and made a part hereof as Exhibit "K".

13. At the scheduled meeting on January 27, 1972, the General Counsel's representative disclosed that General Counsel Nash had decided to make a significant portion of the information sought in the instant case available

to Plaintiff and to the public generally. Following the disclosure of such policy change, one of Plaintiff's counsel in Case No. 19-CB-1673 filed a request with the Regional Director of Region 19 of the Board pursuant to applicable Board rules and regulations requesting that the hearing in Case No. 19-CB-1673 be postponed until one month after Plaintiff had been provided access to the information which the General Counsel had now consented to disclose. A copy of this letter which was mailed on or about February 3, 1972, is attached hereto and made a part hereto as Exhibit "L". On the same date, the undersigned wrote to the General Counsel setting forth the reasons why such information is directly relevant to and necessary to Plaintiff's presentation and preparation in Case No. 19-CB-1673 scheduled to commence on February 23, 1972, in Butte, Montana. (A copy of said letter is attached hereto and made a part hereof as Exhibit "M".)

14. On or about February 3, 1972, the undersigned met with John Irvin, Associate General Counsel, and several other of Defendant's staff representatives, to discuss the necessity of the continuance of the hearing in Case No. 19-CB-1673 based upon the unavailability of a substantial part of the information requested in advance of said date. At that meeting, the undersigned was presented with a copy of the letter sent to one of Plaintiff's counsel in the Board proceeding formally advising Plaintiff of the nature of the information which would be supplied to it and further advising that a substantial portion of such information could not be available until at least three weeks following the time when agency personnel could be assignd to the task of preparing the materials and indices for such materials. (A copy of said letter dated February 3, 1972, is attached hereto and made a part hereof as Exhibit "N".) On the day following said meeting, the undersigned, by letter of February 4, 1972, set forth three additional reasons why the requested continuance should be granted which reasons had been raised during the meeting of February 3, 1972, but which had not been included in the earlier letter to Mr. Nash of February 3, 1972. (A

copy of the February 4, 1972 letter is attached hereto and made part hereof as Exhibit "O".)

15. On February 7, 1972, the undersigned along with Mr. Richard Pincus, one of the attorneys for Plaintiff in the Board proceeding, met with General Counsel Nash at which time Plaintiff again presented the reasons why an extension was warranted in the underlying Board proceeding and the lack of prejudice which would result to any party to such proceeding in the event such limited continuance was granted. Among the reasons noted was the absence of objection by the union's counsel to said continuance and his agreement that the hearing be rescheduled to April 6, 1972 to allow both the Plaintiff and the union sufficient time to examine the memoranda and other materials prior to any hearing in the Board proceeding. The General Counsel was further advised that no prejudice would result to the employees affected by the Board proceeding since Plaintiff voluntarily implemented for its employees all the economic benefits of the Association contract without objection from the union. Defendant Nash was further advised that substantial prejudice would, however, result to Plaintiff since a significant portion of the memoranda and materials which the General Counsel had now agreed to supply admittedly could not be made available in sufficient time to be of use prior to the February 23, 1972 scheduled hearing date. Defendant Nash was further reminded that had he or his predecessor agreed to supply such information when requested in excess of six months ago, there would be no necessity for the current postponement request. On February 8, 1972, Plaintiff's representative wrote to Mr. Nash again reiterating the bases for Plaintiff's request and the compelling reasons why such request was necessary. (A copy of said letter is attached hereto and made a part hereof as Exhibit "P".)

16. By letter of February 8, 1972, Defendant Nash wrote to the undersigned advising that he and the Regional Director had mutually decided to deny Plaintiff's request for a continuance of the hearing from its currently scheduled February 23, 1972 date to 30 days from the date that Plaintiff was supplied with the memoranda

and other materials which the General Counsel now agreed would be made available to Plaintiff. Defendant Nash enclosed with the said letter certain advice memoranda dealing with the subject of withdrawal from multi-employer bargaining units as well as an index to said Advice Branch memoranda. As he acknowledges in said letter, however, said memoranda will have to be retyped because they are not clearly legible in their present form. Additionally, certain other Advice Memoranda in areas related to withdrawals from multi-employer bargaining units are not currently available and according to Mr. Nash's letter, will be supplied at an indefinite date in the future which could extend beyond the February 23, 1972 hearing date. While said letter advises Plaintiff that the appeals memoranda are "available now" for inspection by Plaintiff's representatives, since the Appeals Memoranda have not been maintained according to a subject matter index, Plaintiff's representatives could not possibly complete their examination of the approximately 7,000-8,000 cases involved prior to the scheduled February 23, 1972 hearing date. (A copy of Mr. Nash's letter of February 8, 1972 is attached hereto and made a part hereof as Exhibit "Q".)

17. By letter of February 9, 1972, Plaintiff's representative advised Defendant Nash that Plaintiff would make its own personnel available to assist in retrieving the approximately 7,000 to 8,000 appeals cases which he has now indicated are public information which will be made available to Plaintiff. Plaintiff further advised said Defendant that because of the short notice given Plaintiff to supply such personnel for such task prior to February 16, 1972, and since, according to Defendant Nash's estimate, it will take at least three weeks to complete the review of such Appeals Memoranda, such task clearly cannot be completed prior to the February 23, 1972 hearing date. Moreover, as Plaintiff further advised Defendant Nash in the letter, even if the task could be completed on or before that date, there would clearly be an inadequate time remaining prior to the hearing date to enable Plaintiff to assess such information and make necessary pre-trial preparations in light

of the information obtained. A copy of Plaintiff's aforementioned February 9, 1972 letter is attached hereto and made a part hereof as Exhibit "R".

18. The memoranda and other documents which Defendant Nash has now agreed should be supplied to Plaintiff but which Defendant Nash concedes cannot, because of administrative difficulties, be made available to Plaintiff in sufficient time to be of use prior to the February 23, 1972 hearing date, consist of:

(a) Appeals Section Memoranda for the past five years concerning the application of the Board's *Retail Associates* (120 NLRB 388) rule respecting timely withdrawal from multi-employer bargaining units;

(b) Advice and Appeals Memoranda bearing upon the question of when "actual bargaining" begins, both in the context of withdrawal from multi-employer bargaining as well as in other factual and legal context;

(c) Advice and Appeals Memoranda dealing with the contract successorship doctrine of *Burns International Detective Agency* v. *NLRB*, now pending before the Supreme Court for decision, (Sup. Ct. Docket Nos. 71123 and 71198) as well as cases dealing with lockouts occurring in multi-employer bargaining situations.

19. The necessity for the memoranda described in paragraph 18 above is created by the novel and complex questions presented in the underlying Board proceeding in Case No. 19-CB-1673 which have never heretofore been resolved by the Board or the courts in the factual situations therein presented. The resolution of the issues in that case by the Board's trial examiner and the Board will depend upon the application of the Board's *Retail Associates* rule in the novel situation where Sears' withdrawal from a multi-employer bargaining situation occurred prior to the first meeting scheduled for bargaining but subsequent to the preliminary exchange of bargaining proposals between the association and union. The *Retail Associates* rule, as now constituted, permits withdrawals from multi-employer bargaining provided such withdrawal occurs before "actual bargaining" begins. Consequently, the determining factor as to whether or not Sears' withdrawal was timely will necessarily turn on

the question of whether "actual bargaining" begins as of the first scheduled meeting date for bargaining or whether "actual bargaining" begins as of the date preliminary bargaining proposals are exchanged. The novelty of the issues to be litigated is demonstrated by the disagreement between the General Counsel's Advice and Appeals Sections concerning their disposition of the charge in Case No. 19-CB-1673. Moreover, the absence of elucidating Board and court precedent will necessarily require the Board to reexamine, in light of the novel factual situation presented, the underlying rationale of *Retail Associates* and perhaps even require a complete redefinition of the withdrawal standards imposed by that rule. As a consequence, Plaintiff deems it essential to present a full record before the Board's trial examiner and the Board to meet the questions raised in the now to be supplied Advice and Appeals Memoranda and to explore fully all of the important issues presented to assure that the rule which emerges from this landmark case will effectively accommodate certain important and conflicting statutory objectives. To assist us in this task, Plaintiff believes that such Advice and Appeals Memoranda, incorporating administrative determinations never heretofore published or otherwise made available to the public, which have analyzed and considered issues similar or analogous to those to be presented in Case No. 19-CB-1673 will be invaluable. Moreover, since the rule which emerges from 19-CB-1673 will be one of general application, it becomes especially important to Plaintiff to examine and analyze the multitude of factual situations presented in such Advice and Appeals Memoranda so that the impact of the withdrawal standard to be advocated in 19-CB-1673 for application in future cases can be intelligently assessed. Similarly, past Advice and Appeals determinations which require a reconciliation between the Act's policy of encouraging bargaining stability will be equally paramount statutory objective of giving maximum protection to the concept of freedom of contract in bargaining could prove equally invaluable in fully explicating Plaintiff's presentation and arguments in 19-CB-1673, since a similar reconciliation must

be made in that case also. An example of one area which has been the subject of past Advice and Appeals determinations is in the *Burns* type of case involving the issue of whether an employer not a party to a labor contract can be required to be bound by such contract through the Board's "successorship" doctrine. Like *Burns*, the decision in 19-CB-1673 will also require the Board to promulgate a rule which accommodates a party's freedom to make his own bargain through individual negotiations without unduly undermining the goals of bargaining stability sought to be achieved under the limitations imposed by *Retail Associates* on a party's right to withdraw from multi-employer bargaining.

20. Plaintiff believes that no prejudice will result to any party by the granting of Plaintiff's request that a continuance be required from February 23, 1972 until a date 30 days beyond the time when the above described memoranda are made available to Plaintiff's representative. The union Respondent in Case No. 19-CB-1673 has indicated it has no objection to such continuance and is, in fact, agreeable to reschedule the hearing to April 6, 1972. Moreover, the brief delay requested will not prejudice the employees involved in said proceeding since said employees are currently enjoying all of the economic benefits of the recently negotiated association contract which were implemented by Plaintiff without the Union's objection shortly after said contract was executed. In contrast, Plaintiff has been and is being substantially prejudiced by Defendant's refusal to grant such continuance since, through no fault of Plaintiff, a substantial portion of the memoranda which Plaintiff deems essential to its preparation for hearing cannot be supplied in sufficient time to be of any use prior to the currently scheduled hearing date.

/s/ Gerard C. Smetana

Subscribed and sworn before me this 10th day of February, 1972.

/s/ Constance C. Fath
Notary Public

My Commission Expires December 14, 1976.

NOTE: Exhibits "A" through "H" to the Affidavit of Gerard C. Smetana are duplicates of documents printed at pp. 12-37 *supra*, as Exhibits "A" through "D" and "F" through "I" to Amended Complaint. Exhibit "N" to the Affidavit is a duplicate of the document printed at pp. 42-44 *supra* as Exhibit 1 to Defendants' Answer. Exhibit "P" to the Affidavit was not designated for reprinting in this appendix.

EXHIBIT "I"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1571-71

SEARS, ROEBUCK & CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act, PLAINTIFF

v.

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, Acting General Counsel, in his own behalf and as agent for the NATIONAL LABOR RELATIONS BOARD, DEFENDANTS

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE A RESPONSIVE PLEADING

The General Counsel of the National Labor Relations Board, by the Assistant General Counsel, hereby requests that this Court extend the time for the filing of defendants' responsive pleading in this case from December 4, 1971, to and including February 3, 1972. In support thereof the Board shows as follows:

1) The Amended Complaint was filed on October 14, 1971; the Board's responsive pleading is presently due December 3, 1971, by stipulation of the parties.

2) The Amended Complaint seeks information pursuant to the Freedom of Information Act, 5 U.S.C. Sec. 552, which defendant Goslee, then Acting General Counsel, denied to the plaintiffs. The Amended Complaint asserts that several categories of materials contained in the files of the General Counsel's Office of Appeals and Advice Branch must be maintained and disclosed under the Information Act, and seeks disclosure of certain materials in those categories.

3) Peter G. Nash is now General Counsel of the National Labor Relations Board and has ordered a review

of the refusal to disclose such information and is presently disposed to believe that he will make the information available.

4) The General Counsel expects that a complete and final review of the question of whether and how to make such information available will be made by the beginning of January.

5) A decision by the General Counsel that such information can and should be made available would obviate the need for the instant suit, or at least simplify it. Therefore, postponing further pleadings pending such decision would conserve the time of the Court as well as the parties.

6) Counsel for the plaintiff has advised that he opposes this motion.

WHEREFORE, the General Counsel of the National Labor Relations Board respectfully requests that this motion for extension be granted and that the time for filing its responsive pleading to the Amended Complaint be extended to February 3, 1972.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

By /s/ Glen M. Bendixsen
GLEN M. BENDIXSEN
Chief of Special Litigation
Washington, D.C. 20570
Telephone: (202) 382-5401

Co-Counsel: Charles N. Steele
(Ext. 6164)

Janet Morris
(Ext. 4087)

Dated at Washington, D.C. this 30th day of November 1971.

EXHIBIT "J"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1571-71

SEARS, ROEBUCK & CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act, PLAINTIFF

v.

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, Acting General Counsel, on his own behalf and as agent for the NATIONAL LABOR RELATIONS BOARD, 1717 Pennsylvania Avenue, N.W. Washington, D.C. 393-311, DEFENDANTS

OPPOSITION TO MOTION FOR EXTENSION OF TIME IN WHICH TO FILE RESPONSIVE PLEADING

SEARS, ROEBUCK AND CO., by its attorneys, hereby opposes the Motion of the National Labor Relations Board for an extension of sixty days, to and including February 3, 1972, in which to file its answer in the captioned action. In support whereof, the following is shown:

1. This action was commenced on August 4, 1971 by Plaintiff Sears, Roebuck and Co. on behalf of itself and others similarly situated to compel the disclosure of certain materials within the possession of the National Labor Relations Board and to permanently enjoin Defendants from continuing to abridge the rights of Plaintiff and the class it represents by refusing to supply Advice and Appeals Memoranda and indices thereof as requested in Plaintiff's Request and Renewed Request.

2. Defendants have, to date, been afforded 120 days within which to file an answer. The Board now requests an additional extension of 60 days in which to file its answer on the grounds that review of the Board's refusal to disclose the requested information is presently under way, and that the Board is disposed to believe that such information will ultimately be provided.

3. Plaintiff appreciates that the Board's decision whether to release the sought information is a matter of substantial importance to the agency and that its decision is a difficult one which must, therefore, receive the Board's full and careful consideration. In recognition of this factor, Plaintiff has refrained, and will cooperate with Defendants by continuing to refrain, from commencing discovery or other such procedures. The amicable resolution of this matter is in the interest of all of the parties, and the Court. Plaintiff must, however, oppose the Board's motion for the following reasons.

4. Plaintiff is a participant in Retail Clerks Union, Local No. 4, Retail Clerks International Assoc., AFL-CIO, and Sears, Roebuck and Co., NLRB Case No. 19-CB-1673, which is scheduled for trial on January 26, 1972. The information sought in the present action is directly relevant to, and could materially aid Plaintiff in preparation for, that case.[1] The Board's request for an extension of time of sixty days in which to file its answer, to and including February 3, 1972, would not only delay the timely advance of this action, but could also hinder Plaintiff in effectively preparing for the aforementioned case.

5. Filing of a responsive pleading by Defendants in the instant action requires no present attention by the Court and would not, therefore, expend the resources of the Court. Even if the Board does subsequently furnish the information sought by Plaintiff and the class it represents, no significant amount of resources of the parties or the Court will have been wasted by the earlier filing of Defendants' answer. But, should the Board ultimately decide not to make the information available, in whole

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[1] The relevance of the information sought in this action has recently been recognized by the District of Columbia Circuit. *See NLRB* v. *Julius Getman and Steven P. Goldman*, No. 71-1097 (D.C. 1971); *Sterling Drug Inc.* v. *FTC*, No. 24,878 (D.C. Cir., decided October 15, 1971); *Patsy T. Mink* v. *Environmental Protection Agency*, No. 71-1708 (D.C. Cir., decided October 15, 1971).

or in part, this action will have been further delayed by the withholding of Defendants' answer pending the Board's decision.

6. Plaintiff is in agreement with Defendants that, pending the Board's decision whether to make the requested information available, the parties should not cause the Court to unnecessarily commit its time and attention to this action. However, the filing of Defendants' responsive pleading should not have such an effect, should not delay the Board in reaching its final decision, but would permit this action to advance in an orderly fashion.

WHEREFORE, for the foregoing reasons, the Board's Motion for Extension of Time should be denied.

Respectfully submitted,

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Dated: December 1, 1971

EXHIBIT "K"

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Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
Russell M. Kofoed
K. Bruce Stickler
David L. Evans
Jeffrey S. Goldman

Area Code 312
Telephone 641-0200

January 21, 1972

Mr. Charles N. Steele
Division of Litigation
National Labor Relations Board
1717 Pennsylvania Avenue N.W.
Washington, D.C. 20570

Re: *Sears, Roebuck and Co.* v. *National Labor Relations Board*
United States District Court
For The District of Columbia
Civil Action No. 1571-71

Dear Mr. Steele:

We are pleased to learn today that the General Counsel is contemplating making available at least some of the information we have sought in the above-captioned case, and that such information will be made available at the time of the forth-coming meeting of the American Bar Association's Section on Labor Relations Law. For this reason, as you know, we did not vigorously oppose today the granting of your motion for an extension of time to file a responsive pleading.

We expect that, once the position of the General Counsel has been announced, you will proceed expeditiously with the instant case insofar as there are any outstanding issues. Moreover, depending on the nature and extent of the information that will be made available, we may be required, as we indicated today, to seek a further extension in Case No. 19-CB-1673 so that we will have an opportunity to fully review the data supplied.

Very truly yours,

Lawrence M. Cohen
For Lederer, Fox and Grove

LMC:hy

EXHIBIT "L"

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

Philip C. Lederer
Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
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K. Bruce Stickler
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Area Code 312
Telephone 641-0200

February 1, 1972

Mr. Charles M. Henderson
Regional Director
National Labor Relations Board, Region 19
1000 Republic Building
1511 Third Avenue
Seattle, Washington 98101

Re: *Retail Clerks Union, Local No. 4 Retail Clerks International Association, AFL-CIO and Sears, Roebuck and Co.*—Case No. 19-CB-1673

Dear Mr. Henderson:

On behalf of Sears, Roebuck and Co., the charging party in the above-captioned case, we hereby request, pursuant to Section 102.16 of the Board's Rules and Regulations, that the hearing date herein be rescheduled from February 23, 1972 to the date described below.

This request is based solely on the necessity that Sears have, in order to prepare for the hearing in the instant case, the information which it has sought from the Board in *Sears, Roebuck and Co. v. National Labor Re-*

lations Board, Civil Action 1571-71 (D.D.C.). General Counsel Nash recently advised the American Bar Association's Section on Labor Relations Law that significant portions of such information would now be made available. For the reasons set forth in the attached letter to Mr. Nash, it is apparent that such information is directly relevant to and could materially aid Sears in preparation for the trial of the instant case.

In view of the imminent disclosure of information relating hereto, which Sears has previously sought unsuccessfully to obtain over an extended period of time, we request that the present hearing be continued until one month after Sears has been provided access to the material described in the attached letter to Mr. Nash. The availability of such information prior to trial is critical, we believe, in facilitating the meaningful disposition of this matter.

A copy of this request is being sent to counsel for the Respondent and counsel for the General Counsel.

Very truly yours,

/s/ S. Richard Pincus
S. Richard Pincus
For Lederer, Fox and Grove
Attorneys for Sears, Roebuck and Co.

SRP:hy
Enclosure

cc Mr. Ralph Wilmot
Regional Attorney
National Labor Relations Board
Region 19

Mr. Irwin H. Socoloff
Attorney for Retail Clerks Union,
Local No. 4
1775 K Street, N.W.
Washington, D.C. 20006

EXHIBIT "M"

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

Philip C. Lederer
Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
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David L. Evans
Jeffrey S. Goldman

Area Code 312
Telephone 641-0200

February 3, 1972

Peter Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D.C.

Re: Sears, Roebuck and Co. v.
National Labor Relations Board
United States District Court
For the District of Columbia
Civil Action No. 1571-71

Dear Mr. Nash:

We were most happy to learn that your office is considering making available certain indices and memoranda of advice and appeals determinations which, in the past, have been witheld from public disclosure. Specifically, we understand from disclosures made at the ABA Practice and Procedures Committee that you contemplate making the information available on the following basis:

1) All advice memoranda issued since August 1, 1971;

2) Appeal memoranda issued since August 1, 1971 sustaining the Regional Director's dismissal of a charge; and
3) An index of such memoranda for all such cases decided since August 1, 1971.

While such information is extremely helpful to the Bar generally, we believe our litigation is *sui-generis*, and our need for additional information will not set adverse precedent.

First, you will not create a precedent for delay by giving Plaintiff access to such information for cases decided prior to August 1, 1971 in as much as Plaintiff's request was initiated on July 14, 1971, over six months ago. Information preceding the August 1, 1971 cut-off date is essential to Plaintiff's preparation of its case in the underlying proceeding in Case No. 19-CB-1673.

Second, the necessity for the indices, memoranda, etc. described in our July 14 and July 29, 1971 letters to you for the five year period preceding such request is created by the novel and complex questions presented in 19-CB-1673 which have never heretofore been resolved by the Board or the courts in the factual situation presented therein. As you know, 19-CB-1673 concerns the application of the Board's *Retail Associates* (120 NLRB 388) in a novel situation where Sears' withdrawal occurred following a preliminary exchange of proposals but prior to the first meeting for bargaining. The absence of elucidating Board and court precedent will necessarily require both the Trial Examiner and the Board to reexamine, in the light of these novel facts, the underlying rationale of *Retail Associates* and, perhaps require a complete redefination of the withdrawal standards imposed by that rule. As a consequence, it is essential that the charging party and the General Counsel's representative present relevant testimony to meet the questions raised in the sought after Advice and Appeals Memoranda at the hearing and in their briefs, and to explore fully all facets of the important issues presented to assure that the rule which emerges from this case will effectively accomodate certain important and conflicting

statutory objectives. To assist us in this important goal, we belive that advice and appeal memoranda and the indices to such administrative determinations over the past five years involving questions similar and analogous to those presented in 19-CB-1673 could be invaluable. While we recognize that such administrative determinations could not be utilized as binding precedent on the Board or the courts, the memoranda will nonetheless reflect a thorough examination and analysis of the very same questions and considerations involved in 19-CB-1673 which the best minds on the General Counsel's staff have considered to be pertinent in deciding such cases. Moreover, since the rule which results from 19-CB-1673 will be one of general application, it becomes especially important to examine and analyze the multitude of factual contexts presented in such administrative memoranda so that the impact of the withdrawal standards or rules to be advocated in 19-CB-1673 for future application can be intelligently assessed. By way of illustration, memoranda bearing upon the question of when "actual bargaining" begins both in the context of withdrawal from multi-employer bargaining as well as in other factual and legal situations would be especially pertinent.

Likewise, past advice and appeals determinations which required a reconciliation between the Act's policy of encouraging bargaining stability with its equally paramount objective of giving maximum protection to the concept of freedom of contract in bargaining will prove equally invaluable in fully explicating our position in 19-CB-1673, since a similar reconciliation must also be made there. An example of one such area is presented by *Burns International Detective Agency* v. *NLRB*, now pending before the Supreme Court for decision, (Supreme Court docket nos. 71123 and 71198) involving the question of whether an employer can be bound by a contract not of his own making. Like *Burns*, the decision in 19-CB-1673 will also require the Board to enunciate a rule which accommodates a party's freedom to make his own bargain through individual negotiations without unduly undermining the goal of bargaining stability sought to be achieved under the limitations imposed by *Retail*

Associates on a party's right to withdraw from multi-employer bargaining. For example, in *Burns* it was asserted that the failure to impose a bargaining agreement on a non-party thereto would result in major industrial strife. This is one of the areas which may be present or have been analyzed in advice memoranda that were issued at the time when it was mandatory for the regions to submit *Burns* type cases. Certainly these considerations have equal relevance in determining whether to impose a contract in the context of permissible withdrawals from multi-employer bargaining units. Since the Advice and Appeals sections have, in the past, had occasion to consider numerous *Retail Associate's* and *Burns'* type cases, and since each relates to a readily identifiable and well-defined area, and are, according to Mr. Goslee's letter of July 23, 1971 "collected and filed according to the issues raised in each case", should be made available without much inconvenience.

Pending your decision on the foregoing request and in view of the fact that we have not yet been given access to the information we have requested, and further, that we need such information to prepare appropriate witnesses for the hearing in 19-CB-1673, now scheduled to commence on February 23, 1972, to keep delay to a minimum, we would be prepared to immediately start examining whichever material you deem appropriate at this time.

We are enclosing a copy of a letter to Regional Director Henderson, formally requesting an extension of the hearing date from February 23, 1972 to 30 days from the date the information requested herein is made available to us.

We would like to reiterate that should such extension of time be granted, it would not be setting a precedent. This case is surely *sui-generis*—for had our request been honored when made, as you would no doubt do under your new proposed policy change, we would have had more than ample time to study such advice and appeal memoranda since our initial request in July, 1971.

We would be most happy to examine such documents at your convenience and pay for the cost of any duplicating that may be necessary.

Thank you for your cooperation.

Sincerely,

/s/ Lawrence M. Cohen
Lawrence M. Cohen

/s/ Gerald C. Smetana
Gerald C. Smetana

/s/ Alan Raywid
Alan Raywid

Enclosure

cc: John Irving, Esquire
Mr. Charles M. Henderson

EXHIBIT "O"

SEARS, ROEBUCK AND CO.
1211 Connecticut Avenue
Washington, D.C. 20036

Area Code 202
223-5840

February 4, 1972

John Irving, Esquire
Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Sears, Roebuck and Co. v. National Labor Relations Board, United States District Court for the District of Columbia, Civil Action No. 1571-71 and Retail Clerks Union, Local 4, Retail Clerks International Association, AFL-CIO and Sears, Roebuck and Co., Case No. 19-CB-1673

Dear Mr. Irving:

We want to thank you for the opportunity of being able to make an oral presentation to you and your staff in support of our letter of February 3 to Peter Nash.

Please consider this letter as supplemental to our request for an extension of time in the Butte Case, 19-CB-1673. There were three further matters that we raised during the oral discussion that we had not included in our letter as grounds for the granting of a continuance and why granting of such request in this case would not be precedential:

1) Our cooperation with the General Counsel's office in granting extensions of time in the Freedom of Information case to permit the General Counsel to formulate these new policies and opposing in form only the General Counsel's last request for an extension so that the policy change could initially be discussed at the mid-winter meeting of the American Bar Association's special committee dealing with the subject. As a result of

the charging parties' gentlemanly dealing with the Freedom of Information litigation, the General Counsel has had since August of 1971 to file a responsive pleading.

2) Your letter of February 3 to Mr. Cohen indicates that some of the material which we seek will not be available for approximately three weeks which appears to coincide with the presently scheduled February 23 hearing date. Accordingly, along with the reasons we set forth in our letter of February 3, including why we need this material to prepare witnesses prior to the Board hearing, it would now appear to us that an appropriate date would be one month from February 23.

As we indicated at our meeting, we would be prepared at the earliest possible time to examine the index that you would make available so that we can limit the areas of our inquiry. At this time, the areas that appear to be relevant are cases dealing with withdrawal from multi-employer bargaining situations, successorship cases such as *Burns* and lock-out cases occurring in multi-employer bargaining situations.

3) As further evidence of our attempt not to delay these proceedings, we have promptly made the request for this additional time so as not to even miss one day, we have promptly commenced and cooperated with the Counsel for the General Counsel in 19-CB-1673 in making arrangements for the preparation of the case and have scheduled further preparations with the Counsel for the General Counsel, which commitments will be honored.

Accordingly, we respectfully urge that one month's extension from February 23, 1972 be granted.

Sincerely,

/s/ Gerald C. Smetana
Gerald C. Smetana

cc: Mr. Nash
Mr. Henderson

EXHIBIT "Q"

[Logo]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 February 8, 1972

Re: Retail Clerks Union, Local 4,
Retail Clerks International
Association, AFL-CIO and
Sears, Roebuck and Co.,
Case No. 19-CB-1673

Mr. Gerald C. Smetana
Sears Roebuck and Company
1211 Connecticut Avenue
Washington, D.C. 20036

Dear Mr. Smetana:

This will acknowledge receipt of your letters of February 3 and 4, 1972, and confirm our conversation in my office on February 7, 1972, concerning the Company's request for a postponement of the subject unfair labor practice hearing.

I have given careful consideration to your request for postponement, have had this matter discussed with the Regional Director and we have decided that your request must be denied. In doing so, I am cognizant of the fact that the union has raised no objections to this extension and of your argument that this extension is necessitated by a desire to review all of the documents which this Office is supplying to you pursuant to your requests under the Freedom of Information Act. In my letter to you of February 3, 1972, I advised you that the memoranda which you requested under the Freedom of Information Act would be forthcoming but noted that I did not consider this material to be of precedential value. It is my intention to provide the public with as much information as possible concerning the decisions of the General Counsel because I believe that such knowledge will greatly benefit the operations of the Agency and assist it in

achieving its goals. I will not, however, permit my decision to provide this information to stand in the way of timely resolution of unfair labor charges pending before the Agency.

The information you request concerning Advice memoranda dealing with the subject of withdrawal from multiemployer bargaining units and the index to the Advice Branch memoranda are available for you and are transmitted herewith. Inasmuch as these copies appear difficult to read, I will have them retyped if you find this necessary. However, I am sure that you will want these as quickly as possible so I am transmitting them at this time.

Appeals memoranda are available to you under the guidelines described in my letter to you of February 3, 1972. Pursuant to our discussion yesterday and because these memoranda are not indexed by subject matter, we will make the memoranda available to your representative who can then review them to determine which he wishes to copy. These documents are available now and we await your decision with respect to them. Procedures for this inspection can be worked out when we are advised of your decision. In the meantime we are preparing to send to you the Appeals memoranda, if any, in those cases which were the subject of the enclosed Advice memoranda. Your request for the memoranda in cases dealing with the *Burns* doctrine and lockouts made last week will be supplied to you as soon as possible.

Very truly yours,

Peter G. Nash
General Counsel

Enclosures

EXHIBIT "R"

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

Philip C. Lederer
Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
Russell M. Kofoed
K. Bruce Stickler
David L. Evans
Jeffrey S. Goldman

Area Code 312
Telephone 641-0200

February 9, 1972

Peter Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Sears, Roebuck and Co. v. National Labor Relations Board, Civil Action No. 1571-71 (D.C.D.C.), Board Case No. 19-CB-1673

Dear Mr. Nash:

This will acknowledge receipt of your letter of February 8, 1972, denying our postponement request in Case No. 19-CB-1673, as well as the enclosures submitted therewith, which consist of copies of the Advice Index and the sanitized version of Advice memoranda dealing with the subject of withdrawals from multi-employer bargaining units. We understand that the additional Advice memoranda dealing with the *Burns* doctrine and lockouts, which was encompassed within our initial re-

quest of July 14, 1971, are not currently available and will not be available until an indefinite future date.

With respect to the materials sent, we note that they are not identical copies of the Advice memoranda requested, but they are instead, a sanitized version thereof from which you have deleted the names of the parties as well as the names of other Advice memoranda upon which reliance is placed by the Advice Section in making its disposition of the case. As you know, we have consistently taken the position in the Court proceeding that the entirety of the Advice and Appeals memoranda are required to be supplied in accordance with the provisions of the Freedom of Information Act, and our receipt of such memoranda in their diluted form should not be construed as a waiver by Plaintiff of that position. Additionally, most of the Advice memoranda supplied are, as you acknowledge, difficult to read and we therefore accept your suggestion that they be retyped by your office and resubmitted to us in more readable form.

In accordance with our letter of February 8, 1972, we again offer to make our own personnel available to assist in retrieving the approximately 7,000 to 8,000 appeals cases which you now indicate will be made available to us. Because of the short notice given, we will be unable to supply such personnel for this task prior to February 16, 1972. We are advising you of this decision now so that you can determine the procedures which will be applicable to our representatives in their review of such appeals memoranda or other documents. According to your latest estimate, it will take at least three weeks to complete the review of such memoranda, and it therefore seems apparent that the task cannot be completed prior to the February 23, 1972 hearing date. Even if it could be completed on or before that date, there would obviously be inadequate time left to enable us to assess such information and make our necessary pre-trial preparations in light of the information obtained. Notwithstanding this, however, we stand ready to begin the retrieval task on February 16, 1972 and, unless advised to the contrary, shall have a representative

present at Mr. Herman's office to begin the necessary review.

Very truly yours,

/s/ S. Richard Pincus
S. Richard Pincus
For Lederer, Fox & Grove

AFFIDAVIT

I, JEFFREY S. GOLDMAN, swear and affirm that:

1. I am an attorney-at-law with the law firm of Lederer, Fox & Grove of Chicago, Illinois, and, since February 16, 1972, have been conducting a review of the General Counsel's memoranda of appeals decisions issued by the Appeals Section of the General Counsel of the N.L.R.B. on behalf of my client, Sears, Roebuck and Co.

2. On February 16, 1972, the General Counsel of the N.L.R.B. permitted me access to the memoranda of these decisions for the first time.

3. Since that date, I have worked in the offices of the National Labor Relations Board at 1717 Pennsylvania Avenue, Washington, D.C., in accord with the directives of the representatives of the General Counsel, to wit:

A. I have examined the decisions without disturbing their original order.

B. I have conducted the review without making any written notes on substantive matters.

C. I have avoided, as requested, unessential conversations with Board personnel while within the Board offices.

4. My purpose in conducting a review of these Memoranda was to locate decisions relevant to a novel and complex issue presented in Board Case No. 19-CB-1673, which has never heretofore been resolved by the Board or the courts in the factual situation presented therein. Since the questions in Case No. 19-CB-1673 are whether the withdrawal by Sears from a multi-employer bargaining unit was timely, and whether Sears can be bound to an agreement it did not negotiate, I have sought decisions which cast light upon the appropriate standard for withdrawals, upon a definition of "actual bargaining", and upon standards required to bind a party to a collective bargaining agreement which it has not negotiated.

5. Being advised by the General Counsel that no index exists, I must analyze approximately 8,000 memoranda on a case by case basis. To date, I have examined ap-

proximately 2,500 of these memoranda, from which I have been able to distill 80 that I have requested be reproduced at the expense of my client. At this rate of progress, seven additional weeks will be required to complete this review.

6. Of the 2,500 decisions examined to date, the Appeals Section denied 90-95% of these appeals, terminating all further proceedings.

7. These memoranda are not complete decisions. The overwhelming majority of these memoranda explicitly rely upon the "circumstances of the case" which without exception remain unstated. Not infrequently these decisions incorporate by reference, and rely upon, provisions in other documents such as collective bargaining agreements, or settlement agreements, without describing the language or effect of the pertinent provisions. None of the cases indicate the rationale of either the Regional Director's decision from which the appeals are taken, or the arguments of the parties to which the Appeals Section is responding.

8. Being unable to abstract the meaning of these memoranda because of these techniques of omission and incorporation by reference, I orally requested the materials which complete these decisions.

9. Pending a decision on this request by the General Counsel, each case requiring additional documentation was designated, and the original oral request was renewed.

10. On February 29, 1972, a representative of the General Counsel denied my request for access to any additional material.

11. On March 1, 1972, I formally requested by letter, the underlying non-confidential documents: (1) the Regional Director's decision from which the designated appeals were taken; (2) the statements of position submitted by the parties to the Appeals Section; and (3) the pertinent evidentiary documents, e.g., collective bargaining agreements. I offered to specify which materials in the designated cases were needed when I was again given access to the designated cases, which theretofore had been read without making notes, as requested.

12. On March 3, 1972, the representative of the General Counsel orally denied all my requests made in the letter of March 1, and confirmed this denial in a letter on March 7, 1972.

/s/ Jeffrey S. Goldman
Jeffrey S. Goldman

Subscribed an sworn to before me this 10th day of March, 1972.

/s/ Constance C. Fath
Notary Public

My commission expires December 14, 1976.

[Caption omitted in Printing]

STATEMENT OF GENUINE ISSUES

The General Counsel of the National Labor Relations Board pursuant to Rule 9(h) of this Court files this Statement of Genuine Issues on the grounds that plaintiff's Statement of Material Facts Not In Dispute incorrectly states as fact certain legal conclusions and omits some material facts.

1) The Advice Branch is not empowered and does not issue instructions to the Regional Directors, contrary to plaintiff's Statement of Material Fact No. 6 (Hereafter Statement).

2) The Appeals Memoranda are not incomplete (contrary to Statement, No. 8) but contain all material originally placed in them, except stated deletions which are explained. When memoranda refer to the "circumstances of the case," reference is made not to extraneous documents, but to materials in the investigatory files of such cases.

Additionally, the General Counsel says that the following are additional statement of material facts not in dispute:

3) Only the Regional Directors have been delegated the General Counsel's power to issue complaints. The Advice Branch cannot order, or instruct the Regional Director to order, issuance of complaint.

4) Advice memoranda are not cited as precedent in any agency decisions.

5) Appeals memoranda ("minutes") have never been indexed by subject matter, but have been indexed solely by case number.

6) Appeals minutes are not cited as precedent in any agency decisions.

7) Appeals minutes were prepared in all cases before April 1971. Since then Appeals minutes have not been prepared except in major cases where complaint issues.

The General Counsel submits, however, that the above facts are basically not in dispute, and accordingly, do not require trial for their determination.

GLEN M. BENDIXSEN
Chief of Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221

Dated at Washington, D.C. this 7th day of June, 1972.

[Caption omitted in Printing]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby moves the Court to enter summary judgment in its favor, in accordance with the provisions of Rule 56(a) and (c) of the Rules of Civil Procedure, on the ground that the pleadings, affidavits, statement of material facts as to which there is no genuine issue, and exhibits attached thereto show that Plaintiff is entitled to judgment as a matter of law.

Gerard C. Smetana
925 South Homan Avenue
Chicago, Illinois 60607

Alan Raywid
Cole, Zylstra & Raywid
2011 Eye Street, N.W.
Washington, D.C. 20006

Lawrence M. Cohen
Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Plaintiff

Of Counsel:

Cole, Zylstra & Raywid
2011 Eye Street, N.W.
Washington, D.C. 20006

Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602

May 23, 1972

[Caption omitted in Printing]

DEFENDANT GENERAL COUNSEL'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant General Counsel hereby moves the Court to enter summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the grounds that the pleadings and the statement of material facts as to which there is no genuine issue and the exhibits thereto show that defendant General Counsel is entitled to judgment as a matter of law.

Respectfully submitted,

Marcel Mallet-Prevost
Assistant General Counsel

By /s/ Glen M. Bendixsen
GLEN M. BENDIXSEN
Chief of Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221
Co-counsel: Charles N. Steele
(Ext. 9352)

Dated at Washington, D.C. this 7th day of June, 1972.

[Caption Omitted in Printing]

POINTS AND AUTHORITIES OF DEFENDANT IN OPPOSITION AND IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

Statement of the Case

This case involves plaintiff Sears' complaint under the Freedom of Information Act seeking to require the General Counsel of the National Labor Relations Board to make available certain documents. All of the documents requested are involved in the processing of charges brought before the General Counsel for the exercise of the discretionary authority vested in him by Section 3(d) of the Act to issue or not to issue unfair labor practice complaints. Accordingly, since the process by which the General Counsel makes that decision forms the backbone of the analysis of this case, we have set forth in Section I below a description of the administrative structure of the General Counsel's office for processing unfair labor practice charges. Thereafter, we have set forth the chronology of this case and the unfair labor practice case during which plaintiff Sears sought these materials.[1]

1. The administrative structure of the General Counsel's Office for processing unfair labor practice charges.

The National Labor Relations Act cannot be applied by the Board on its own initative. Thus, as to the unfair labor practice provisions of the Act, the Board can proceed only after a charge has been filed. Furthermore, a "charge . . . is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry."

[1] While agreeing that the case prevents no material facts necessitating trial, the General Counsel contends that the facts as set forth in plaintiff's Statement of Material Facts Not In Dispute omitted certain material facts and set forth as fact certain legal conclusions. Accordingly, we have this day filed a counter-statement of material facts.

N.L.R.B. v. *Fant Milling Co.*, 360 U.S. 301, 307 (1959). Section 3(d) of the Act vests the General Counsel with ". . . final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10 . . ." The initial power to decide whether a complaint should issue on an unfair labor practice charge has been delegated to the Regional Directors. National Labor Relations Board, Organization and Functions, Section 203.1, 32 F.R. 9588. Board Statement of Procedures, Sec. 101.4, 29 C.F.R. Sec. 101.4. Charges are investigated by members of the Regional Office staff. When the evidence uncovered during the investigation convinced the Regional Director that complaint is warranted he issues a complaint. Statements of Procedure, 101.8, Rules and Regulations, Sec. 102.19(a). On the other hand, if the Regional Director concludes that the issuance of a complaint is unwarranted, he dismisses the charge and so informs the parties "together with a simple statement of his reasons therefore." Statements of Procedure, Sec. 101.6.

A Regional Director's decision is automatically appealable to the General Counsel, where the Office of Appeals reviews the entire file of the case and recommends the action to be taken by the General Counsel. Statements of Procedure, Sec. 101.6; Organization and Functions Sec. 201.1.2. The General Counsel either sustains the refusal to proceed on the charges, "stating the grounds of his affirmance," or he orders the Regional Director to take further action, e.g. orders the Regional Director to issue the complaint. Rules and Regulations 102.19(c). See, generally, General Counsel's *Quarterly Report on Case Developments* (July 31, 1968) R-1114, BNA, Labor Relations Yearbook (1968) pp. 294-295. The decision, together with a statement of the legal grounds for the decision it, is sent to the parties in a letter over the General Counsel's signature. Additionally, the Office of Appeals in some cases prepares a memorandum—or "agenda minute"—analyzing various

aspects of the case which is sent to the Regional Director but not to the parties.[2]

In addition to this formal case handling procedure, the General Counsel maintains an Advice Branch which "reviews regional offices' requests for advice and formulates policy on novel or unsettled procedural and substantive matters arising in unfair labor practice cases." NLRB Organization and Functions, Sec. 202.1.1. Thus, when a Regional Director feels he needs aid on issues raised by a case, he submits a memorandum detailing the facts which raise the problem. On certain issues, particularly current ones raising novel problems, the General Counsel requires the Regional Directors to submit cases for consideration. Statements of Procedure 101.8. See, generally, *Quarterly Report on Case Developments* (Jan. 26, 1968), R-1098, BNA, Labor Relations Yearbook (1968), pp. 283-284. The Advice Branch analyses the facts set forth in the request for Advice and prepares an analysis and a recommended approach which it sends to the Regional Director. It may recommend dismissal of charges or issuance of the complaint, or make its advice contingent on the results of further investigation. Frequently, such memoranda suggest settlement of pending cases as a possible and suggest the basis on which a settlement could be accepted. The memorandum also discuss various defenses that may be raised, possible legal and factual answers to such contentions, and, sometimes suggests possible approaches to prosecution of the case. The memorandum is a guide to the Regional Director as to how to handle a particular case. While a Regional Director would only in a rare instances disregard advice received on factual or legal issues submitted to the Advice Branch, the Advice Branch's instructions are not mandatory since the Regional Director is the only person empowered to make the initial decision to issue or refuse

[2] Prior to April, 1971, the Office of Appeals prepared a minute in all cases. Since that date, minutes have generally been prepared only in cases where a decision to issue complaint was reached, and the staff analysis was felt to be important to the Regional Director in his prosecution of the case. Letters are sent to the parties in all cases.

to issue a complaint; the Advice Branch does not have authority to order issuance of complaints. Indeed, the initial determination of a Regional Director that a complaint is not warranted, even when made after consultation with the Advice Branch, is, as shown, subject to direct reversal by the General Counsel on appeal to his Office of Appeals.

• • • •

APPENDIX A

[Logo]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 February 27, 1970

Mr. Kenneth Culp Davis
University of Chicago
Law School
1111 East 60th Street
Chicago, Illinois 60637

Dear Professor Davis:

This is in reply to your letter of February 9, 1970, in which you ask whether we "have a compilation of memoranda embodying advice and opinions in individual cases, which are not published in the Quarterly Report."

As your letter correctly points out, there is apparently some confusion as to the precise nature of the operations of the Advice Branch and the Office of Appeals. In order to try to clarify the situation, I am attaching hereto 2 copies of "Quarterly Report on Case Developments" which explain these operations. I shall attempt to elaborate on these explanations.

With respect to the Office of Appeals, the Quarterly Report notes, each case "including statements submitted by any party, is assigned to an attorney and his supervisor. After a detailed review, they prepare a memorandum containing a statement of facts, an analysis of all legal and factual issues involved, and a recommendation for disposition of the appeal." This memorandum merely serves as a basis for staff discussion and does not constitute the final disposition of the case. That disposition, which is ultimately made by the "Appeals Committee," is explained in a letter which is sent to all interested parties. No subject index, compilation, or book of digests of these memoranda and letters is maintained. A copy of each such letter and memorandum is

placed in the individual case file, and cannot thereafter be retrieved, except by reference to the case name and number.

In the Advice Branch, the Quarterly Report notes, "when a case is fully prepared for review, it is then presented, either orally or by written memorandum, to what is termed 'the agenda'." These memoranda, which are prepared solely for use by the "agenda" in considering the case, are not digested, indexed, or in any way compiled according to subject matter. A copy of such memorandum is placed in the file of the case maintained by the Advice Branch and it can only be located by reference to the case name and number. The decision of the "agenda" is usually communicated to the Regional Offices by a further memorandum. This memorandum does not constitute the final disposition of the case, but is in the nature of a guide to the Regional Offices respecting the further handling of the specific case. There is no digest system for these memoranda; however, a set of them is retained by the Advice Branch, classified and filed according to the issues raised in each case, for use by its staff as a research tool. The final disposition of an advice case is reflected in the Regional Director's subsequent action which usually takes the form of issuance of a complaint or a letter explaining his reasons for declining to do so.

I trust that the foregoing helps answer your inquiry.

Sincerely yours,

/s/ Samuel A. Chaitovitz
Samuel A. Chaitovitz
Deputy Assistant General Counsel

cc: Arthur Schiller, Esq.

QUARTERLY REPORT ON CASE DEVELOPMENTS BY NATIONAL LABOR RELATIONS BOARD GENERAL COUNSEL PETER G. NASH (OFFICIAL TEXT)

Quarter Ending March 31, 1972

This Report includes a selection of cases to which I directed my personal attention during the first quarter of this year.

The majority of these cases were considered either as "Advice" cases or "Appeals" cases. "Appeals" cases arise on a charging party's appeal to the Office of Appeals in Washington from a decision by a Regional Director to dismiss a charge for lack of merit. "Advice" cases involve matters referred to the Regional Advice Branch in Washington from the various Regional Offices under guidelines set out at the beginning of this Quarterly Report.

Although this Report is in no sense exhaustive, since the reported cases constitute only a fraction of the cases which I have dealt in this period, its scope is somewhat more expansive than has been the case in the past. This more expansive treatment, along with the inclusion of "Advice Submission Guidelines," is but further evidence of my desire to keep the public advised of how, when, and why I am acting. Such a policy, in my judgment, produces a better informed labor bar and public and affords me the opportunity to receive comments on my action—both assure a better and more responsible National Labor Relations Board.

/s/ Peter G. Nash
Peter G. Nash
General Counsel

I ADVICE SUBMISSION GUIDELINES

The General Counsel's instructions to the Regional Offices of the Board concerning the submission of cases for review in the Regional Advice Branch provide that the Regional Director in each office should submit for advice any case which he finds to involve:

a. New or doubtful legal questions.

b. Region-wide, inter-Regional, or national interest.

c. Matters which may be affected by Titles I-VI of the Labor-Management Reporting and Disclosure Act of 1959.

d. Section 8(f) issues not clearly controlled by existing Board precedents.

e. *Miranda Fuel*, 140 NLRB 181, issues and issues concerning the union's duty of equal representation of all unit employees. *Except* that, in such cases, the Regional Director may dismiss or solicit a withdrawal request if he concludes that the evidence is insufficient to establish that the alleged discrimination, restraint, or coercion was based on any consideration of union membership or activity, or on any other irrelevant, unfair, or invidious consideration.

f. Union "internal" discipline issues not clearly controlled by existing Board precedents.

g. Successorship or "contract assumption" issues not clearly controlled by existing Board precedents.

h. Bargaining obligation issues concerning whether an employer's decision is "essentially financial and managerial in nature" within the meaning of *General Motors Corp.*, 191 NLRB No. 149.

i. Cases raising Section 8(a)(2), 8(a)(5) or 8(b)(3) allegations involving the U.S. Postal Service. However the Region may dismiss such cases which turn essentially on issues of fact and where the evi-

dence disclosed by investigation is clearly insufficient to support the charge.

j. Issues arising under Phase II of the economic stabilization program.

k. Section 8(b)(7) issues not clearly controlled by existing Board precedents.

l. Doubtful issues arising under *Collyer Insulated Wire*, 192 NLRB No. 150. See General Counsel's memorandum of February 28, 1972, concerning Arbitration Deferral Policy Under *Collyer*.

m. Issues arising under *Packinghouse Workers* v. *N.L.R.B. (Farmers Cooperative Compress)*, 416 F. 2d 1126, 70 LRRM 2489, *Farmers Cooperative Compress*, 194 NLRB No. 3.

n. Novel remedial issues including those arising under *I.U.E.* v. *N.L.R.B. (Tiidee Products, Inc.)*, 426 F. 2d 1243, 73 LRRM 2870.

II. ACCOMMODATION BETWEEN THE NLRA AND OTHER STATUTES

A. The NLRA And The Civil Rights Act of 1964

Particularly significant in the administration of the NLRA are cases involving the relationship between this act and other statutes. The last Quarterly Report, in presenting one such case, contained the observation that ". . . the interaction of the purposes and policies of the Act with those of other statutes and governmental programs has been a continuing source of interest and has presented problems of compromise and accommodation."

More recently, the need for this adjustment and accommodation was reflected in the Board's decision in *Graziano Construction Co.*, 195 NLRB No. 5. There, in finding a union fine to have violated Section 8(b)(1)(A), the Board pointed to the Supreme Court's language in *Scofield* v. *N.L.R.B.*, 394 U.S. 423, which indicates that overriding policies which Congress has imbedded in "the

labor laws" are relevant to a determination of whether an internal rule enforced by a union against a member reflects a legitimate union interest. This language, the Board said, implies an obligation on the part of the Board to consider "the full panoply of congressional labor policies in determining the legality of a union fine."

This Quarterly Report contains seven cases which focus on areas in which both the NLRA and some other statute are relevant and in which an effort was made to effectuate the basic policies of each. Three of these cases pertained to conduct affecting rights guaranteed by the Civil Rights Act of 1964; in four of these cases it was necessary to consider the impact of regulations issued during Phase I or Phase II of the Economic Stabilization Program; the last of these cases involved one of the rare instances in which state law can affect the exercise of rights under the NLRA.

Of the three cases which dealt with matters subject to the Civil Rights Act of 1964, the first resembled the case contained in the previous Quarterly Report in which the employer effected midterm modifications of the contract, over the union's objection, as a consequence of overriding national policy on employment opportunities for minority groups.

1. *Midterm contract modification to correct sex discrimination without the assent of the contracting union*

In this first case the parties had in the mid-1950's adopted a uniform retirement age for employees to be hired thereafter but retained from the previous pension agreement the retirement age for women already employed. By 1970 there were some 40 women who retained this earlier retirement right in a bargaining unit of several thousand employees. During the negotiation of the current bargaining agreement, the "grandmother" clause was modified in an attempt to conform to a ruling of a government agency on sex discrimination in employment; the parties agreed to a provision gradually phasing out the early retirement age for women hired

under the original pension plan. Soon thereafter, however, another government agency in a written interpretation concerning application of the Civil Rights Act of 1964 to pension plans, took the position that equalization of employment benefits must be achieved "immediately without waiting for gradual attrition of those affected." This agency suggested that immediate equalization could be accomplished by raising the retirement age for all women to that for men. But it also recognized that the retirement age for all employees might also be lowered to that provided for women in the original pension agreement. When the Employer proposed to the Union the former course, the Union insisted upon either retention of the existing contract provision for the gradual phasing out of the retirement age differential or a reduction of the retirement age for all employees to the lower age. Rejecting the Union's counter-proposals, the Employer made the retirement age of the 40 affected women to the higher age applicable to all the other unit employees.

The General Counsel believed that several factors militated in favor of dismissal of the resulting 8(a)(5) charge filed by the Union. The Employer was under a legal obligation to modify the existing contract provision on retirement age equalization; the Employer discussed the proposed change with the Union and did not act in bad faith in rejecting the alternatives offered by the Union; and the change effected by the Employer was consistent with the views of a federal administrative agency having direct responsibility for this subject. The General Counsel was convinced that the obvious necessity revealed by these facts for accommodating the statutory schemes of the Civil Rights Act and the NLRA in this instance brought into play the principles of the Supreme Court's decision in *Southern Steamship* v. *N.L.R.B.*, 316 U.S. 31. Accordingly, he concluded that the Employer's action which modified the contract without Union assent, but after bargaining, could not be viewed as violative of Section 8(a)(5) in these circumstances.

2. *Employee filing of charges with a State fair employment practice agency as an activity protected by the Act*

In the other two cases which involved conduct subject to both the Civil Rights Act and the NLRA, the charges were filed under Section 8(a)(1) of the Act. In each of these cases the Employer discriminated against the Charging Party for his having filed charges with the state fair employment practice agency alleging employer discrimination against Mexican-Americans such as himself. The filing of charges such as these with a state FEPC is, under Title VII of the Civil Rights Act of 1964, a prerequisite to the filing of charges with the Federal Equal Employment Opportunity Commission.

The General Counsel authorized the issuance of complaints in both of these cases alleging the discrimination to have violated Section 8(a)(1). The court, in *United Packinghouse, Food and Allied Workers* v. *N.L.R.B.*, 416 F. 2d 1126 (C.A.D.C.), expressed the view that employer discrimination on the basis of race or national origin violates the Act and the Board's decision on remand in that case did not reject the court's view. Under this view, a policy or practice of racial discrimination engenders an unjustified clash of interests between groups of employees, creating in the disfavored group an "apathy or docility" which inhibits them from asserting their rights under Section 7 to work collectively for the achievement of their legitimate employment goals. A reasonable extension of this view is the argument that employer interference with the filing of charges seeking the relief from such discrimination afforded by a concerned governmental agency has essentially the same effect in deterring employee exercise of Section 7 rights as the racial or national origin discrimination itself has.

Under outstanding precedent, the Board, as well as the EEOC, has the authority to enforce public policy against discrimination in employment based on race or national origin. Therefore, the General Counsel concluded that the attempted intimidation of an employee for filing a charge attacking such discrimination, even though that

charge is filed with an agency other than the Board, would likewise abridge rights guaranteed by the Act.

Considered distinguishable was the Board's ruling in *Hunt Tool Company*, 192 NLRB No. 29, in which the Board found that a single employee's filing a claim under the Jones Act was not a concerted activity and, therefore, not within the protection of the NLRA. There the claim made by the employee was "purely personal" while in these cases the charges filed with the State FEPC alleging discrimination on account of national origin were of a group or class nature, affecting all persons of this national origin who hold, or may apply for, jobs with the employers. Also, the remedy for a claim under the Jones Act consists only of damages to the claimant; the remedy under Title VII of the Civil Rights Act might eliminate discriminatory employment practices affecting the working conditions of employees generally and not merely those of the individual charging parties.

Finally, the bargaining agreement in one of these cases contained a provision barring discrimination on grounds of nationality, *inter alia*. The filing of a charge alleging ethnic discrimination with the State FEPC agency could be viewed a means of giving effect to the policy set out in the collective bargaining agreement itself. It was, therefore, considered to constitute a "concerted" activity in the same sense that an individual employee's filing a grievance under a bargaining contract is considered to be "concerted." *Bunney Brothers Construction Company*, 139 NLRB 1516.

B. The NLRA and The Economic Stabilization Act

The necessity of accommodating the NLRA to labor policies reflected in other statutes has arisen in still another area with the President's activation of regulatory machinery under the Economic Stabilization Act. The imposition of restrictions upon wages, one of the basic mandatory subjects of bargaining, has interjected a new element into collective bargaining and, not surprisingly, the General Counsel has been presented in several recent cases with questions as to the bargaining obligation of

employers and unions subject to Pay Board requirements. The determination in each case rested on its particular facts but each required a consideration of the relationship between the policies of the LMRA and the Economic Stabilization Program.

1. *Employer refusal to pay an agreed wage increase because of Pay Board regulations*

In one case, the question was raised as to an employer's good faith in refusing to make retroactive wage payments and initiating a challenge to these payments before the Pay Board. The Employer had separate agreements with two Unions which expired prior to the Phase I wage freeze. During Phase I the Employer negotiated new agreements with each of the Unions providing for retroactive wage increases effective as of the respective expiration dates of the old agreements. Each agreement stated that the wage increases were subject to the wage freeze and would be applied to the extent allowable under any applicable governmental controls. The Employer implemented the contracts on November 14, 1971, but declined to pay the retroactive increases for the period from August 15 through November 13, 1971, relying upon Economic Circular No. 102 at 502(6) which provided in pertinent part:

> However, for work performed after August 15 the actual rate which was in effect during the base period shall be the ceiling wage for the freeze period.

After implementing the remaining provisions of the contracts, the Employer, pursuant to Pay Board Regulations, requested the Pay Board to review the retroactive pay increases to determine whether they were consistent with Pay Board criteria. The Unions filed Section 8(a)(5) charges alleging that the Employer had engaged in bad faith bargaining by refusing to pay the retroactive wages for the period from August 15 through November 13, 1971, and by initiating review of the wage increases by the Pay Board.

Considering the Employer's actions in light of the outstanding regulations of the Pay Board and the provisions of the bargaining contracts subjecting retroactive increases to governmental controls, the General Counsel refused to authorize issuance of complaint. In his view, the Employer's seeking Pay Board review of the agreement to increase wages retroactively could not be found to conflict with bargaining obligations under the NLRA if the policies of this Act and those of the legislative and executive program for economic stabilization are to be accommodated one to the other.

2. *Employer reliance on wage guides to justify unilateral action in changing wages*

In different circumstances, however, the General Counsel concluded that Pay Board guidelines did not privilege the Employer's conduct which, absent the Pay Board regulations, would have plainly violated Section 8(a)(5) of the Act.

During the Phase I wage freeze, the Employer proposed to the Union that the new contract of the parties provide for a 6.5 percent wage increase and improved retirement benefits, to be effective at the end of the freeze period if permitted by law. When the Union advised the Employer that it accepted the proposal, the Employer took the position that it could not enter into the contract it had proposed. It first contended that the "proposals" exceeded "the President's wage restrictions," then that it wanted time in which to research the question. When the Union suggested that the Employer sign the new agreement and submit it to the Pay Board for approval, the Employer refused to do so. Later the Employer contended that the parties should wait and see what the new wage guidelines would be and that it was not obligated to bargain about wages which would exceed these guidelines. When the wage freeze expired and the Phase II guidelines were issued—providing a 5.5 percent standard for wage increases effective after Phase I—the Employer informed the Union that it was immediately putting into effect a 5.5 percent wage increase and the pension improvement previously "proposed."

The General Counsel authorized an 8(a)(5) complaint. He concluded that the Employer's unilateral institution of a wage increase different from the increase previously agreed to by the parties violated the Act. Also, it was concluded that the Employer acted in bad faith in refusing to treat the Union's acceptance of its proposal as consummating an agreement. This conclusion was based on the Employer's subsequent unilateral change of employment conditions, on its action in withdrawing its proposal after acceptance by the Union, and on the various contentions it made to justify this action. Finally, the Employer's withdrawal from its proposal after Union acceptance was viewed as a belated withdrawal after agreement had been reached on the terms of the contract. Accordingly, the Employer's refusal to sign the agreement reached was viewed as violative of Section 8(a)(5) under the *Heinz*[1] principle.

3. *Union insistence on the payment of a retroactive wage increase which violated Pay Board regulations*

A third case relating to the Economic Stabilization Act presented the question of whether a Union violated Section 8(b)(3) by insisting that the Employer make retroactive wage payments for work performed during the Phase I wage freeze. The Employer in that case was a subcontractor who began working on a construction project in September 1971. The Employer paid the wage rates of an area agreement between an employer association and the Union, but did not become a party to the agreement. The area agreement provided for a general wage increase effective October 1, 1971, but the increase was not put into effect because of the Economic Stabilization Program. Following expiration of Phase I of the Program, the employer association and the Union obtained approval from the Construction Industry Stabilization Committee to pay the wage increase of the area agreement retroactively to October 1, 1971. The Union then demanded that the Employer also pay the retroac-

[1] *H. J. Heinz* v. *N.L.R.B.*, 311 U.S. 514.

tive wage increase immediately. The Employer refused, taking the position that if he made retroactive payments for a period when he was not party to any agreement with the Union he would violate the Economic Stabilization Act unless the retroactive payment were first approved. He offered, however, to sign the agreement and grant the wage increase *in futuro* and to pay the retroactive increases if and when approved by the Pay Board. The Union continued to demand that the Employer immediately pay the wage increase retroactively to October 1, 1971, and when he refused, called a strike shutting down the construction site. The Employer filed an 8(b)(3) charge.

Viewing the Union's demand not as a request for an *agreement* to pay retroactive wage increases subject to Pay Board approval but as a demand for actual, immediate *payment* of retroactive wage increases without Pay Board approval, the General Counsel authorized issuance of complaint. Although the Pay Board had approved the retroactive increases provided in the area agreement, that approval had no bearing upon the Employer who was not bound by that contract. Because retroactive wage payments for the Phase I period in the absence of a contract approved by the Pay Board were contrary to Pay Board regulations, the General Counsel found the Unions to have violated Section 8(b)(3) by striking to secure, and by conditioning full agreement on, the Employer's immediate payment of the retroactive wage increase.

4. *Unprotectedness of a strike to compel payment of a wage increase exceeding the wage ceiling*

It is well established that, absent contractual restrictions, employees who strike to compel their employer to grant increased wages and to improve working conditions are engaged in concerted activity protected by the Act. However, the Board had long held that a strike to compel an employer to act illegally is not so protected. Cf. *American News Co., Inc.*, 55 NLRB 1302.

In a case arising on appeal during the last quarter, the Employer had agreed to grant its employees a wage increase but was prevented from doing so by the President's institution of the "wage-price freeze." The employees then struck to compel the Employer to implement the increase, and the Employer discharged the strikers. The General Counsel concluded that the principle enunciated in *American News, supra*, was controlling, that the employees were, therefore, not engaged in protected activity, and that their consequent discharges were not unlawful.

5. *Injunctive relief for ULP's involving the Economic Stabilization Act*

In the second and third of the above cases, having authorized complaints under Section 8(a)(5) and Section 8(b)(3), respectfully, the General Counsel recommended to the Board that temporary injunctive relief be sought under Section 10(j). In the 8(a)(5) case he pointed out that a ruling by the Pay Board could not be obtained on the wage increase agreed upon until the parties had signed a contract; absent such a contract and approval by the Pay Board, recoupment of the unpaid part of the wage increase pursuant to a Labor Board order might be limited to a period which would begin with Pay Board approval. Consequently, 10(j) proceedings to require the Employer to sign the agreed-upon contract were considered warranted. In the 8(b)(3) case he pointed out that the Union's unlawful conduct had totally shut down an important urban development project. While the General Counsel did not suggest that the temporary nature of Phase II would necessarily justify proceedings under Section 10(j) on all meritorious charges in which Phase II regulations are relevant, he did feel that in these two cases the temporary nature of Phase II warranted 10(j) proceedings to insure vitiation of the effects of the violations as completely as possible upon ultimate Board issuance of a remedial order.

The Board approved the General Counsel's recommendation that temporary relief be sought in the 8(a)(5) case. However, in the 8(b)(3) case the question of in-

junctive relief was mooted by the Union's termination of the strike.

C. The NLRB and State Right-to-Work Laws

Union insistence in bargaining on an agency shop agreement prohibited by a State Right-to-work Law

In one case the question of accommodation of the NLRA to other statutory labor policies was raised not by the Federal statute but by a State right-to-work law.

In bargaining, the Union had conditioned agreement on inclusion in the contract of an agency shop clause, a clause requiring the payment of a sum equal to membership dues to the bargaining representative. This form of union-security is privileged under Federal law, the Supreme Court having held an agency shop agreement to be a "less vigorous, less compulsory" form of union security than the union shop agreement which is privileged under the first proviso to Section 8(a)(3) of the NLRA. *N.L.R.B.* v. *General Motors Corp.*, 373 U.S. 734. The Employer nevertheless rejected the Union's agency shop proposal on the ground that it would violate the State right-to-work laws and filed a refusal to bargain charge against the Union.

The General Counsel found the Employer's contention to be well founded. That Section 14(b) of the NLRA reserves to the States the power to prohibit agency shop agreements and to enforce this prohibition was established by the Supreme Court's decision in *Retail Clerks Int'l. Assn., Local 1625, AFL-CIO* v. *Schermerhorn*, 373 U.S. 746, 375 U.S. 96. In the case before the General Counsel, the highest State court had not ruled on the illegality of an agency shop clause under the State right-to-work law, having declined to do so in the one case in which that issue reached the Court. But a State trial court and the State attorney general had both construed the law to include the agency shop as a proscribed form of union security. These opinions, in the absence of disagreement on the part of the State Supreme Court, were viewed as establishing that the State law proscribed execution or enforcement of an agency shop agreement.

The question which remained was whether the Union's insistence on an agency shop provision in this State violated Section 8(b)(3) of the Act. An agency shop clause is a permissible form of union security under Section 8(a)(3) of the NLRA and would also be a mandatory subject of bargaining if the state right-to-work law were not considered. The fact that a union security agreement is violative of state law does not make the execution or maintenance of such an agreement unlawful under the NLRA. Finally, under the *Schermerhorn* decision on reargument, *supra*, it is clear that while the state right-to-work law reaches execution and enforcement of an agency shop agreement, it does not reach a party's insistence upon such an agreement in bargaining negotiations. It could thus be argued that the NLRA leaves to the States the enforcement of state right-to-work laws, and that these laws are irrelevant to union security questions raised under the Federal statute.

The General Counsel rejected this argument in the circumstances of this case. He believed that no determination of the obligation to bargain under the NLRA could be justified which failed to take into consideration the untenable position in which the Employer would be placed if the Union were privileged in bargaining and in the exertion of economic pressure, adamantly to insist upon the Employer's acceding to a demand which would cause the Employer to violate valid state law. Accordingly, the General Counsel concluded that to achieve the accommodation, obviously necessary in these circumstances, between a state law sanctioned by Section 14(b) of the Act and the obligation to bargain under the Act, an agency shop clause must be considered not to constitute a mandatory subject of bargaining in a state in which such a clause is proscribed. It followed that by insisting on an agency shop and by conditioning the execution of an agreement covering mandatory subjects of bargaining on inclusion of such a provision, the Union violated its bargaining obligation under Section 8(b)(3) of the Act.

III. EMPLOYER THREATS

Employer threat to sue a union unless the union withdrew ULP charges

The Board has long recognized that right of any party to resort to civil suit for adjudication of its claims. However, a party may not threaten suit unless such threat is made in good faith and not for purposes of harassing or intimidating employees. *Clyde Taylor Company*, 127 NLRB 103, 108-109; cf. *United Aircraft Corp. (Pratt & Whitney Div.)*, 192 NLRB No. 62, slip op. 9-10, where the Employer was found to have had a reasonable basis for making such a threat.

In a case considered on appeal to the General Counsel during the past quarter, the Union struck in violation of the contractual no-strike clause and, upon termination of the strike and reinstatement of most of the strikers, filed a charge with the Board contesting the Employer's refusal to furnish information relating to the latter's refusal to reinstate certain other strikers. The Employer thereupon threatened to institute civil action to recover damages suffered during the strike, as well as damages resulting from the Union's filing of the unfair labor practice charge, unless the Union withdrew the charge. The Employer's defense of its conduct was grounded upon a contract clause which read, in pertinent part:

> In the event [of a strike in violation of contract] . . . the Union shall . . . advise the employees involved that unless they terminate such action, they will be subject to immediate discharge, and *the Union will not undertake any action in their behalf to modify or rectify such* discharge . . . . [Emphasis supplied.]

The General Counsel concluded that the Employer's threat was not in good faith but intimidated the employees and, therefore, constituted a violation of Section 8(a)(1). It was noted that merit had been found in a companion case in which the Union had sought information. Unlike *United Aircraft, supra*, the Employer's

action could not be said to have been "part of a good-faith effort to negotiate a settlement of the numerous claims arising out of [a] bitter strike . . ." (*Id.* at 10). Inasmuch as enforcement of the above clause in the instant circumstances would have had the effect of impeding access to the Board's unfair labor practice processes and would, therfore, have contravened public policy (See *N.L.R.B.* v. *General Motors Corp.*, 116 F.2d 306, 311-312 [C. A. 7]), it could not be said that the Employer's reliance upon such clause was privileged. Accordingly, the General Counsel authorized issuance of an 8(a)(1) complaint.

IV. PROTECTED CONCERTED ACTIVITIES

1. *Employees' civil suit against their employer and union as a protecied activity*

Concerted employee conduct appeared in the unusual form of employee initiation of a court suit in one case in which the General Gounsel found this conduct to have been protected by Section 7 of the Act.

After losing the union offices they held in the last union election, the four employees involved in the case filed a ULP charge against their Employer alleging illegal assistance to the Union. After their charge was dismissed, they filed a civil suit for damages and injunctive relief against both the Employer and the Union, alleging the Employer to have conspired in their earlier ouster as officers in the Union and the Union to have improperly discriminated against them in its administration of the bargaining agreement. Shortly thereafter the Employer discharged them, at least in part because they had instituted this suit. The discharged employees in turn filed the instant 8(a)(1) and (3) charges against the Employer.

The General Counsel authorized complaint. He saw this case as turning on the fact that the civil action involved allegations of both employer interference with internal union administration and union impropriety in the performance of its functions as a statutory bargaining representative under Section 9(a) of the Act. Since

this employee action was clearly concerted in character and had as its object the vindication of the right of the charging parties to fair and equal representation, it was within the scope of the protection afforded employees by Section 7 of the Act. As the evidence did not establish that in filing this suit the charging parties defamed the Employer or intended the suit merely as a harassing tactic, the discharges were viewed as having violated the Act.

Applicability of a no-strike agreement to employees honoring a picket line maintained by a different union

The Board has been frequently called upon to determine whether particular strike activity is in derogation of "no-strike" clauses in collective bargaining agreements and therefore, unprotected by the Act. See, e.g., *The Hearst Corporation, News American Division*, 161 NLRB 1405. See also, General Counsel's Quarterly Report of Case Developments, No. R-1094, October 30, 1967, at pp. 8-9, 1967 Labor Relations Yearbook 393 (BNA).

In a recent appeals case employees refused to cross a picket line established by a sister local which was striking the Employer to secure a contract at a plant in another State. The Employer, in disciplining the employees, took the position that such conduct was prohibited by the no-strike clause which provided in pertinent part:

> Should differences arise between the Company and the Union as to the interpretation or application of the provisions of this agreement, or should any dispute of any kind arise, it is agreed that there shall be no work stoppages, walk-outs or slow-downs, until the entire grievance procedure has been exhausted . . . .

The question presented was whether this no-strike clause encompassed the kind of work stoppage in which the employees engaged by honoring the picket line. Had the no-strike clause simply prohibited work stoppages in "any dispute of any kind" without further qualification, the clause might well have applied in this situation. But since the clause prohibited work stoppages in such disputes only "until the entire grievance procedure has been exhausted," the clause, considered as a whole, plainly implied that "any disputes of any kind" was limited to disputes which were cognizable and processable as grievances under the contract grievance procedures. The dispute in the instant case which prompted the picketing concerned the negotiation of a new contract between the Employer and a different union at a different plant. Obviously, therefore, it was not a dispute which could have been filed and processed as a grievance under this contract. Accordingly, the General Counsel concluded that the dispute giving rise to the work stoppage here was not subject to, or proscribed by, the no-strike agreement contained in the contract and was, therefore, protected under Section 7 of the Act. Cf. *Kellogg Company*, 189 NLRB No. 123; *Montana-Dakota Utilities Co.*, 189 NLRB No. 111; *Hoffman Beverage Co.*, 163 NLRB 981.

V. UNION CAUSED DISCRIMINATION BASED ON ARBITRARY OR IRRELEVANT CONSIDERATIONS

1. *Union attempt to cause the discharge of an employee by means of a strike violating a non-strike clause*

The duty of a statutory bargaining representative under Section 9(a) to represent all unit employees fairly includes the duty to refrain from action affecting the employment rights of unit employees on the basis of "irrelevant, invidious, or unfair" considerations. *Miranda Fuel Co.*, 140 NLRB 181, 185. In the last quarter, the General Counsel was presented with a novel set of circumstances involving application of this principle.

The collective bargaining agreement between the Union and the Employer contained grievance and arbitration procedures and a no-strike clause. However, when the Employer "recalled" the Charging Party from layoff, the Union disputed his right to recall under the contract

and struck. The Employer capitulated and demoted the employee to a lower paying job. The employee responded by filing an 8(b)(1)(A) and (2) charge.

The Union's position as to the recall rights of the Charging Party was based on an arguable construction of the contract and there was no evidence of membership discrimination or arbitrary considerations motivating the Union's conduct; therefore, the Union could not be said to have acted for unprivileged reasons in disputing his right to recall under the contract. Cf. *Shield Radio & T.V. Productions*, 153 NLRB 68; *Triangle Publications*, 189 NLRB No. 105. And the Union's strike did not constitute an unfair labor practice under existing precedent merely because it violated the no-strike agreement. *Cheney California Lumber Co.*, 130 NLRB 235; *Island Creek Coal Co.*, 186 NLRB No. 60.

Reasoning that the Union's striking to cause the discharge of a unit employee in the face of the grievance, arbitration and no-strike provisions of the contract was "arbitrary" in the circumstances, the General Counsel authorized an 8(b)(1)(A) and (2) complaint. The Union's contractual undertaking to resolve employee job-rights disputes through the machinery provided in the collective bargaining agreement without resorting to economic force was considered not merely an assurance to the Employer of uninterrupted production. It was also considered to provide an assurance, on which unit employees might reasonably rely, that if the Union, as their statutory bargaining representative, disagreed with their employer over an employee's right to a particular job, the Union would seek settlement of the dispute through the agreed upon, orderly procedures provided in the contract rather than through resort to economic force. By acting in derogation of its contractual obligation to resolve disputes over employment status through the peaceful means provided by the contract, to the detriment of a represented employee, the Union was concluded to have failed in its statutory obligation to represent unit employees fairly.

2. *Union prevention of the hiring of blacks, in violation of the union's contract obligations*

A second case presented a more common combination of "*Miranda Fuel*" factors which figured in the Union's refusal to allow the employment of journeymen trainees. The Union, an incumbent bargaining representative, was a party to an employment plan which representatives of various governmental units, construction trade employers and unions, and interested civic groups had developed to expand the employment opportunities for minority groups in the building industry of the area. However, the Union opposed the hiring of all of the several blacks proposed by the employer association under this plan, ostensibly because of their lack of qualifications. The evidence established, however, that the Union was motivated by the fact that these applicants were black.

Since the Union's action was based on race, the case in this respect resembled the case presented in the previous Quarterly Report (79 LRR 53) involving a Union's preventing the employment of trainees for racial reasons. In the instant case, however, the finding of arbitrariness was also predicated on the fact that the Union acted against its agreement to participate in the minority hiring plan. Whether this plan was a part of the Union's collective bargaining agreement or was a separate agreement, it was viewed as an agreement to which obligations under Section 9(a) attached. The complaint which was authorized alleged the Union to have violated Sections 8(b)(1)(A), (2) and (3) by excluding these applicants for employment for "arbitrary" and "invidious" reasons. *The Business League of Gadsden*, 150 NLRB 312; *Houston Maritime Assn., Inc.*, 168 NLRB 615 and cases cited therein.

VI. UNION DISCIPLINE

1. *Removal of a union steward because of his intraunion charge that the union refused him rights under the contract*

In the first of the two cases involving union discipline of employee-members, the disciplined member had been a union steward who had believed himself entitled under the bargaining agreement to be selected as foreman on the job. However, he was passed over. When he filed intraunion charges alleging the business agent's failure to enforce the contract properly, the Union removed him from his position as steward.

The Union's disciplinary removal of the steward from office was considered "coercive" because of his loss of the exemption accorded stewards from payment of union dues and the special measure of employment protection for stewards provided in the contract.

The essential question posed by the Union's conduct was whether this union discipline invaded an "overriding policy of labor laws" and consequently went beyond the area of "legitimate union interest." Union discipline has been found to violate Section 8(b)(1)(A) on the basis of "overriding policy" in a variety of circumstances, including the expulsion of a member for filing ULP charges without first exhausting internal union remedies (*N.L.R.B.* v. *Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, and its Local 22*, 389 U.S. 1035); the fining of a member for this same reason (*Charles S. Skura*, 148 NLRB 679); fining members for working during a strike proscribed by a no-strike clause (*National Grinding Wheel Corp.*, 176 NLRB 89); levying fines for breach of a union rule the enforcement of which constituted an unlawful midterm modification of the bargaining agreement (*Rochester Telephone Corp.*, 194 NLRB No. 144); and fining members who testify in support of the employer's position in an arbitration proceeding (*San Juan Islands Cannery*, 190 NLRB No. 5).

Authorizing issuance of an 8(b)(1)(A) complaint, the General Counsel viewed the steward's intraunion charge alleging the business agent's misapplication of the contract as raising a question of the Union's performance of its obligation under Section 9(a) of the Act to represent fairly employees for whom it is the statutory bargaining representative. Inquiry by a unit employee into a union's performance of its obligations under Section 9(a) was seen to involve a special area of "overriding policy" not subject to union coercion through internal membership discipline. Consequently, the Union's removal of the steward from office because of such activities was considered beyond the reach of the legitimate interests of the Union.

(2) *A union rule requiring members to authorize the checkoff of their union dues*

The salient feature of the second case on the subject of union discipline was a union rule that "where payroll deductions of union dues and fees is provided by a valid and subsisting contract with an employer, it shall be the only acceptable method [for the payment of membership dues]." The issue which concerned the General Counsel was whether this rule, considered wholly apart from any threats of enforcement made to specific employees and the existence of a union security agreement, constituted a violation of the Act.

Authorizing issuance of a complaint attacking this rule under Section 8(b)(1)(A) of the Act, the General Counsel, relied on the Board's decision in *Westinghouse Electric Corp.*, 180 NLRB 1062, and *Michigan Bell Telephone Co.*, 184 NLRB No. 20. In the *Westinghouse* case the Board pointed out its repeated holding that "dues checkoff authorization must be voluntarily and that an employee has a right under Section 7 to refuse to sign checkoff authorization cards. Any conduct, express or implied, which coerces an employee in his attempt to exercise this right clearly violated Section 8(b)(1)(A)." (Footnote omitted.) In the *Michigan Bell* case, the Board found the union resolution requiring dues payments by

checkoff to violate Section 8(b)(1)(A). Here the Board did not rest any part of this conclusion on the existence of a union security contract or actual threats made in the enforcement of the requirement. These cases were deemed to reflect the Board's view that employee authorization of deductions from wages as a means of satisfying financial obligations to a union must be a matter of voluntary employee choice free from coercion in any form. As a consequence, the Union's rule, making payroll deductions the "only acceptable method" for the payment of union dues, backed by the disciplinary sanctions contained in the Union's constitution for its enforcement, was concluded to conflict with overriding statutory policy and to be outside the Union's disciplinary privilege in matters of legitimate interest to the Union.

This conclusion was not considered to be inconsistent with the Board's decision in *Arthur G. McKee & Co.*, 189 NLRB No. 68, where a union rule requiring the exhaustion of internal union remedies before resort to court or administrative proceedings was held not to violate Section 8(b)(1)(A) *per se*. In so holding, the Board accommodated the principle of exhaustion of internal remedies expressed in the Labor Management Reporting and Disclosure Act to the principle of access to the Board, observing that "since the LMRA and the LMRDA must coexist and complement one another under the statutory scheme and since the LMRA is not paramount, there is no way to say that a section commanding exhaustion of internal remedies is *per se* illegal." But no parallel or similar countervailing policy appears which must be coordinated with federal labor policy requiring that employee checkoff be wholly voluntary and free from coercion.

VII. REFUSAL TO BARGAIN

1. *Union refusal to submit disputes to contract arbitration procedures*

In one charge, the Employer alleged the Union to have refused to bargain in violation of Section 8(b)(3) by refusing to arbitrate several disputes arising over the

Employer's discipline of union stewards. While the Union followed the contractual grievance and arbitration procedures in other kinds of disputes, it refused to do so in disputes over the Employer's treatment of stewards because of a long and documented history of Employer violations *vis-a-vis* union stewards.

The General Counsel was cognizant of precedent indicating that the refusal to arbitrate a dispute does not, standing alone, constitute an unlawful refusal to bargain. *Textron Puerto Rico*, 107 NLRB 583; *Central Illinois Public Service Co.*, 139 NLRB 1407; *Hortex Manufacturing Co.*, 147 NLRB 1151. He found it unnecessary to rely on this precedent, however. In authorizing dismissal of the charge he relied instead on both the history of unfair labor practices by the Employer involving stewards and the fact that the parties had not in the course of their relationship "mutually and voluntarily resolved the disputes which inhere in collective bargaining." *Collyer Insulated Wire*, 192 NLRB No. 150. Proceeding to 8(b)(3) complaint based on the Union's refusal to submit such disputes to arbitration was deemed unwarranted where, as here, unfair labor practice charges concerning such disputes would not be deferred for arbitration under either *Collyer*, *supra*, or *Dubo Manufacturing Corp.*, 142 NLRB 431. *United Aircraft Corp.*, 188 NLRB No. 96, slip opinion, footnote 1.

2. *"Successorship" of a purchaser after a 2-month hiatus in operations*

Changes in ownership of business enterprises give rise to a number of "successorship" problems in the administration of the Act. Essential to the resolution of such problems is the concept of the "continuity of the employing enterprise." Thus, the substantiality of any disruption of operations must be considered in determining whether successorship exists. Compare, e.g., *The Northwest Glove Co.*, 74 NLRB 1697, at p. 1699 (aprx. 1-month hiatus; successorship found), with *Gladding-Paris Corp.*, 192 NLRB No. 40, slip op. p. 2 fn. 2 (2-month hiatus; no successorship). See also *General Coun-*

sel Quarterly Report on Case—Handling Developments, No. R-1094, October 30, 1967, at 10-11, 1967 Labor Relations Yearbook 393 (BNA).

In a recent appeals case, Respondent Employer defended its refusal to recognize the Union which represented its purported predecessor's employees on the ground that an approximate two-month hiatus in operations precluded a finding that it was a successor. In rejecting this argument, the General Counsel noted that at the time of purchase Respondent had met with the employees, announced the temporary closing and promised that they would be recalled by seniority upon resumption of operations. Since Respondent did in fact recall the employees as promised and manufactured basically the same products under the same top officials at the same location with essentially the same equipment and machinery, the hiatus was considered of insufficient consequence to defeat successorship.

3. *Denial of a bargaining order based on authorization cards to a union with a history of "sweetheart" recognition*

A combination of circumstances in a case considered in this quarter resulted in unusual action by the General Counsel when he authorized the issuance of an 8(a)(5) complaint but refused to seek the customary remedy of a bargaining order.

The unlawful employer conduct occurred in the context of a strike for recognition and included a disparity in the wages paid strikers and non-strikers, the withholding of accrued vacation benefits from strikers, and coercive statements made by the Employer. Normally this conduct on the part of an employer would be considered sufficient, given the union's authorization card majority, to warrant complaint alleging violation of 8(a)(5) and (1) and to justify a request for a bargaining order under the rationale of *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575. In this case, however, the General Counsel decided that the interests of the employees involved, and of employees generally under the Statute,

would be best served by not seating the Union in the absence of a certification after a Board-conducted election.

Although the Union had not obtained its card designations in this particular case through coercion or misrepresentation, it had a substantial history of unlawful, collusive recognition arrangements in this geographical area. In fact, based on several Board and court cases reflecting this history, the trial examiner in a case presently pending before the Board had recommended, at the General Counsel's request, a Board order barring the Union for a three year period from accepting recognition for any new group of employees unless certified by the Board following an election.

Although the case pending before the Board involves a "sweetheart contract" and the case being considered by the General Counsel did not, the General Counsel felt that the long history of "sweetheart" conduct, derogating from the right of employees to proper representation, militated against seeking an order installing the Union as the statutory representative on the basis of authorization cards alone. On the other hand, the General Counsel recognized that the Board might nevertheless disagree and find a customary bargaining order to be appropriate in the circumstances of this case. In order, therefore, not to preclude the Board's adoption of such an order, the General Counsel authorized a complaint which included an allegation of a refusal to bargain in violation of Section 8(a)(5).

VIII. SECONDARY BOYCOTTS

1. *Definition of a "labor organization" applied to a group in which only a small proportion of the participants are statutory employees*

The last Quarterly Report of the General Counsel presented a case in which it was found that a civil rights group organized by blacks to promote greater employment opportunities for blacks was not subject to the provisions of Section 8(b)(1)(A) of the Act because it did

not constitute a "labor organization" within the meaning of Section 2(5) of the Act. In a more recent case the question of the definition of a "labor organization" was posed in a different context. The alleged labor organization was charged with having conducted a secondary boycott violative of Section 8(b)(4) and having entered into an agreement violative of Section 8(e).

The workers represented by, and the membership of, the organization in question consisted almost entirely of "agricultural laborers." Because agricultural laborers are outside the definition of "employee" provided by Section 2(3) of the Act, an organization consisting *entirely* of such laborers would, under the definition contained in Section 2(5) of the Act, not constitute a "labor organization" subject to the provisions of the Act inasmuch as it would not be an organization "in which employees participate. However, the organization in this case did *not* consist entirely of agricultural laborers. Thus, investigation of the charges revealed that this organization represented and admitted to membership about 100 individuals whom the Board would hold to be statutory employees because they worked in "commercial" packing sheds handling the agricultural products grown by others. Also considered significant was the fact that in the dispute giving rise to the boycott, the organization sought to become the bargaining representative of more than 100 non-agricultural workers who were clearly "employees" within the meaning of the Act. Cf. *Graham Transportation Co.*, 124 NLRB 960.

Having found that "employees" participated in the charged organization and that it sought to represent statutory employees, the General Counsel concluded that outstanding Board precedent required rejection of any contention that these "employees" were too few in number to constitute the organization a "labor organization" as that term is defined in the Act. In *Masters, Mates and Pilots*, 144 NLRB 1172, 1176-1178, the Board dealt with this same problem except that the group there found to be a labor organization consisted almost entirely of supervisors. In disagreement with the view of a circuit court expressed at an earlier stage in that proceeding,

the Board took the position that it would find the organization to be a labor organization even if "the number of employees in [the organization] was not substantial." In explicating this position the Board did not indicate that an organization must admit to membership and represent any minimum number or proportion of statutory employees to meet the statutory requirement that "employees participate" in a "labor organization." As recently as 1969 the Board cited the *Masters, Mates and Pilots* case as authority on this subject. *Pacific Far East Line, Inc.*, 174 NLRB 1168.

While the *Masters, Mates and Pilots* case pertained to an organization consisting largely of supervisors, the General Counsel saw no way in which the Board's rationale in that case could be found not to apply to an organization, such as that in the instant case, composed largely of agricultural laborers. This conclusion was particularly bolstered by the fact that in *Masters, Mates and Pilots*, where the group consisted principally of supervisors, the Board relied on precedent involving a labor organization composed primarily of agricultural workers.

The General Counsel, therefore, took the *Masters, Mates and Pilots* case as compelling the conclusion in the instant case that the charged organization is a "labor organization." As this organization had clearly engaged in secondary boycotts and entered into 8(e) agreements with employers as defined in the Act, the General Counsel authorized issuance of an 8(b)(4)(B) and 8(e) complaints.

2. *"Ally" doctrine applied to non-unit work farmed out by a struck employer*

Section 8(b)(4)(B) of the Act prohibits a union from enmeshing "neutral" employers in picketing or other coercive conduct lawfully directed toward a primary employer with whom the union has a labor dispute. However, the Board and courts have long held that an employer who performs "struck work" of the primary employer has so "allied" itself with the primary that the former can no longer be considered a "neutral" employer

for purposes of Section 8(b)(4)(B). See *Douds* v. *Metropolitan Federation of Architects, Local 231, (Project Engineering Co.)*, 75 F. Supp. 672; *California Laundry & Linen Supply*, 164 NLRB 426.

In a recent appeals case, the General Counsel was called upon to decide whether this ally doctrine applied to a situation where the work being performed by the subcontractor was not the "struck work" of the employees with whom the general contractor had a dispute. The primary employer was engaged in the manufacture of steel products and also engaged in the construction industry as a steel erection subcontractor. Its production and maintenance (P & M) employees and job-site construction employees were represented by separate sister locals of the same international union and were covered by contracts having different expiration dates.

The P & M employees struck the Employer in support of contract renewal demands and engaged in "roving picketing" of the Employer's trucks as they were making deliveries to various job-sites. When the employer's construction employees refused to perform that part of their normal work involving the unloading of the trucks at the job-sites, the employer subcontracted the unloading and steel erection to another employer. However, the P & M employees would picket the truck whenever employees of the new contractor attempted to unload the steel.

Authorizing dismissal of the 8(b)(4)(B) charge filed by the Employer, the General Counsel concluded that the picketing constituted lawful primary activity notwithstanding the fact that the unloading work was not the work of the striking P & M employees. It was noted that the Board and courts had never held that the "struck work" doctrine had application only where the work in question was work of the striking employees with whom the subcontracting employer had a primary dispute. Rather, all that is required is that the work would have been performed by any employees of the primary employer but for the strike—as was the instant situation. See *Douds, supra.*

IX. RECOGNITIONAL AND ORGANIZATIONAL PICKETING

1. *Determination of the "commencement of" and "a reasonable period" as to picketing occurring in separate periods*

Section 8(b)(7)(C) limits recognitional and organizational picketing to "a reasonable period of time not to excess thirty days" if a representation petition is not filed before the expiration of that period. In one case arising in the last quarter, the separation between the two periods of the Union's picketing raised a question under both the specific 30-day limitation and the more general "reasonable period" test of Section 8(b)(7)(C).

The Union's first picketing of the Employer for recognition stopped on the thirtieth day. After the first period of picketing, the Union told the Employer that picketing would be resumed if the Employer did not recognize, and contract with, the Union. Then, after a 7-month hiatus, the Union resumed picketing for recognition. After this latter picketing had continued for about 2 weeks, the General Counsel authorized issuance of a complaint under Section 8(b)(7)(C), no representation petition having ever been filed.

The complaint was predicated in part on the theory that the more recent picketing was but a continuation of the earlier picketing and therefore the picketing had been continued for more than 30 days after its commencement. Thus, the Union, after the first picketing period, threatened the resumption of picketing if recognition were not granted. And the renewed picketing was conducted by the Union against the Employer in the same geographical area.

The complaint was also predicated on the theory that even if the later picketing was not considered a continuation of the earlier, the more recent picketing of 14 days duration continued for a period which in the circumstances was longer than was "reasonable." This was based on the fact that the Union had earlier picketed the employer for 30 days for this same purpose. Sup-

port for this theory was found in *Stan-Jay Auto Parts*, 127 NLRB 958, enf'd 289 F.2d 41 (C.A. 2) where the Board found that the 17 days of picketing after the effective date of Section 8(b)(7) constituted more than a reasonable period in view of the 2 months of antecedent picketing which immediately preceded the effective date of Section 8(b)(7). See also *Sapulpa Daily Herald*, 138 NLRB 180, enf'd. 321 F. 2d 771 (C.A. 10).

The General Counsel rejected the argument that Section 10(b) would preclude issuance of a complaint because the original picketing occurred more than 6 months before the charge was filed. Under either of the theories on which complaint was authorized, the picketing which exceeded the time limitation of Section 8(b)(7)(C) occurred within the 10(b) period. In the opinion of the General Counsel, the Court's decision in *N.L.R.B.* v. *Bryan Manufacturing Co.*, 362 U.S. 411, justified reliance on the earlier picketing as background evidence. Particularly with respect to the second theory of the complaint, it was noted that in the *Stan-Jay* and *Sapulpa* cases the Board relied on picketing which, although not outside the 10(b) period, was nevertheless lawful because it predated the effective date of Section 8(b)(7).

2. *Projection of annual dollar volume, under Board jurisdictional standards, of an enterprise picketed from its inauguration*

In acting the National Labor Relations Act, as amended, Congress vested the Board with jurisdiction extending to all enterprises whose operations "affect" interstate or foreign commerce. But Congress has recognized the Board's discretion to limit assertion of jurisdiction to enterprises whose effect on commerce is considered substantial. Pursuant to such discretion, the Board has established for the retail industry a minimum $500,000 gross volume standard over a twelve-month period. Where an enterprise has been in operation for less than twelve-months, the Board will determine whether there appeared a "reasonable expectation that the Company in a 12-month period. . . [would] attain minimum jurisdictional

requirements." See *Atlas Roofing Co., Inc.*, 131 NLRB 1267, 1268-1269; *Delta Match Corp.*, 102 NLRB 1400. Such an expectation was not deemed reasonable notwithstanding a loss of business due to picketing, where financial data for a 2-month period prior to the picketing did not support the expectation. *Cenit Noll Sleep Products, Inc.*, 115 NLRB 318.

In a recognitional picketing case arising during the past quarter the General Counsel was called upon to decide, on appeal, whether jurisdiction should be asserted over an employer who had been picketed from the very commencement of operations and therefore had never experienced a normal period upon which an expectation of its 12-month dollar volume could be projected. However, other factors in the case persuaded the General Counsel that jurisdiction should be asserted. Thus, the two owners of the new enterprise had many years of experience in the business and its CPA had made an estimate, based upon the enterprise's investments and other commitments, that the business would realize an annual gross volume of $650,000. Since the enterprise's failure to realize such projection was not shown to have been attributable to any factors other than the effectiveness of the Union's picketing, a refusal to assert jurisdiction would have had the effect of rewarding the union for its successful picketing and not exposing it to Board sanctions except where such picketing was relatively ineffective. See *Fairmount Construction Co.*, 95 NLRB 969, Kachco Corp. d/b/a Hickory Farms of Ohio, 180 NLRB 755.

Accordingly, the case was remanded to the Regional Director for a determination on the merits of the case.

X. FEATHERBEDDING—SECTION 8(b)(6)

1. *Union demand for the payment of a "walking boss"*

In the past quarter, the General Counsel considered two cases arising under Section 8(b)(6) of the Act. Under that section, a labor organization may not "cause or attempt to cause any employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

In the landmark case of *N.L.R.B.* v. *Gamble Enterprises, Inc.*, 345 U.S. 117 (1953) the Supreme Court in concluding that Section 8(b)(6) had not been violated, stated:

> We are not dealing here with offers of *mere "token" or nominal services.* The proposals before us were appropriately treated by the Board as offers in *good faith of substantial performance by competent musicians.* There is no reason to think that sham can be substituted for substance under 8(b)(6) any more than under any other statute. Payments for "standing-by" or the substantial equivalent of "standing-by," are not payments for services performed, but when an employer receives a bona fide offer of *competent performance of relevant services,* it remains for the employer through free and fair negotiation, to determine whether such offer shall be accepted and what compensation shall be paid for the work done. [Emphasis supplied.]

The General Counsel concluded in the first case that authorization of a Section 8(b)(6) complaint was warranted to permit Board determination of the applicability of the Court's decision in the circumstances of the case.

The Employer in this case was the only operator in the area of river barges for the transportation of grain. At each port the Employer had always used two employees, a machinery operator and a helper, for the loading and unloading except at one port where the local representing the helpers insisted that two helpers be retained. A union at another port, from whom the Employer secured its trained machinery operators, was the only source of these semi-skilled operators.

The Charged Union, which had no bargaining relationship with the Employer, demanded that the Employer hire a "walking boss" to supervise the loading employees and keep their timecards. The Employer objected, pointing out that having never worked aboard such barges the members of the Charged Union were not qualified to operate the machinery, let alone supervise this operation, and that the job of keeping time records was already being performed by the machine operator. To the Employer's contention that the Union was demanding that the Employer put a man on its barges to do nothing, the Union's only response was to threaten picketing. The Employer capitulated to the Union's demand at one port and accepted a "walking boss" sent by the Union who had no qualification pertaining to the type of work performed by the Employer's machinery operator and two helpers at that port. This "walking boss" was paid at a higher rate than the other loading employees and he entered a 10-hour day on this timecard notwithstanding the other employees worked only an 8-hour day.

The General Counsel recognized that the absence of economic value to an employer of the employee service which a union demands the employer use and pay for, does not in itself render the union's demand a violation of Section 8(b)(6). *American Newspaper Publishers Assn.* v. *N.L.R.B.*, 345 U.S. 100. But the General Counsel understood the Court to have indicated that the Union must be making a bona fide offer of the competent and substantial performance of relevant services, as distinguished from an offer of "mere 'token' or normal services."

In this case, the "walking boss" was plainly not competent to perform the service for which he was offered by the Union—he was totally unfamiliar with, and unqualified for supervision of, the Employer's operations, and the Union did not make even a pretense of disputing the Employer's assertion that its members were unqualified to perform the function for which the Union offered them. And as keeping the timecards of the operator, the two helpers and the "walking boss" must have required no more than 5 or 10 minutes a day, the services which the Union proposed that the "walking boss" provide the Employer could hardly be characterized as "substantial."

Nor could the Union's demand be considered privileged under *Rabouin d/b/a Conway's Express*, 87 NLRB 972. In that case, the Board, in finding Section 8(b)(6) not to have been violated, observed that the union's demand for payment of money was "made under color of right,

in the nature of a claim for damages for breach of contract." In the instant case, there was neither a contractual nor a bargaining relationship between the Employer and the Union.

In these circumstances, the General Counsel concluded that the Union had offered the Employer " 'token' or normal services," and that the Union's offer was made in bad faith and without any "color of right." It was accordingly concluded that the Union's demand of payment by the Employer for the purported services offered by the Union violated Section 8(b)(6).

2. *Union's demand for money made under a "color of right" in view of the union membership of the employer who breached union rules*

In the other Section 8(b)(6) cases presented to the General Counsel, it was concluded that the charge should be dismissed because the Union's demand was considered to have been made under a "color of right."

The Employer was a member of the Union. After he discharged three employees, the Union, acting under its bylaws, convened an intraunion tribunal to determine whether the discharges violated the Union's bylaws and to award damages for any such violation. The Employer fully participated in the proceedings and was given the opportunity to be represented by counsel. The tribunal concluded that the discharges were invalid and awarded damages to the employees involved. After the Union sought to collect the awards, the Employer filed the 8(b)(6) charge contending that the Union was demanding payment for services not performed and not to be performed.

The General Counsel relying on *Conway's Express, supra*, concluded that the charges were without merit. Although the Union's claim was not based on the breach of a collective bargaining agreement, it was premised on an alleged breach of a union bylaw to which the Employer was "bound" by virtue of his membership in the Union. In these circumstances, it was concluded that the awards were in the nature of a claim for damages for breach of contract and not a demand "in the nature of an exaction."

Oct. 31, 1968

This case was submitted for advice because it involves doubtful legal issues.

FACTS

As a member of a multi-employer bargaining unit, the company was party to a contract with the Charging Union which required that unresolved issues arising in the course of its renegotiations be submitted to the Council on Industrial Relations for final and binding decision. When impasse was reached in the renegotiation of this agreement, the disputed issues were submitted to the Council on Industrial Relations pursuant to the terms of the contract.

The Council on Industrial Relations issued its decision on May 21, 1968, which the Union incorporated in a draft contract and mailed to employers in the multi-employer unit on June 6.

On June 16, the Union notified the Employer that its contract was being cancelled because of its 17-week delinquency in making the required payments to the fringe benefit fund, the contract having provided for its cancellation upon that contingency. However, neither the Employer nor the Union took further action with respect to this cancellation notice and when the other unit employers signed the new contract on July 25, the Union demanded that the Employer do so. The Employer declined, saying that he wanted to discuss it with his partner first. Hearing nothing from the Employer further, the Union filed the instant charge on July 29.

ACTION

It was concluded in agreement with the Region and based on its fact findings that the Employer's refusal to sign the collective bargaining agreement incorporating the findings of the Council of Industrial Relations constituted a violation of Section 8(a)(1) and (5) of the Act.

This conclusion did not require a determination whether the Employer would have violated the Act if it had refused to submit the bargaining dispute to the Council on Industrial Relations for a binding decision pursuant to the terms of the expiring agreement. Rather, it was based on the fact that the Employer acquiesced in the submission of the dispute to the Council on Industrial Relations for a binding decision, on the fact that in the two months which followed the Council's issuance of its decision the Employer raised no objection to content of the contract and the manner of its determination, and on the fact that even after the 8(a)(5) charge alleging the Employer's refusal to execute the contract was filed, the Employer did not contend that the bargaining dispute had been improperly submitted to the Council on Industrial Relations. In these circumstances, it was concluded that the Employer had agreed to be bound by the contract terms determined by the Council on Industrial Relations and was accordingly obligated to sign the contract upon request.

Nor was the Union's purported cancellation of the contract on June 17, 1963, considered to relieve the Employer of his obligation under Section 8(a)(5) to execute the agreement. As the parties were engaged in bargaining for a multi-employer unit, the Union's purported cancellation of the agreement would have constituted an attempted withdrawal from that unit for the purpose of bargaining with the Employer. Such a withdrawal from the multi-employer bargaining would be ineffective as untimely under the rule of *Retail Associates* [1] unless it had been accomplished by mutual assent of the parties to the agreement. However, the Union's subsequent demand that the contract be executed, made to the Employer before the Employer had in any way indicated its assent to withdrawal from the multi-employer unit, necessarily constituted a retraction of its earlier notification of the cancellation of the agreement. And the Employer's response to this demand for contract execution did not suggest it was accepting or relying on

[1] 120 NLRB 388 (1958).

the Union's earlier purported cancellation of the agreement.

Accordingly, the Region was authorized to issue an 8(a)(5) and (1) complaint based on the Employer's refusal to execute the agreement.[2]

[2] Cf. *H. J. Heinz Co.* v. *NLRB*, 311 U.S. 214.

These cases were submitted for advice pursuant to Manual Section 11751.1(d) because of the possibility of outside inquiries addressed to Washington and because of the 10(j) relief request.

In agreement with the Region's recommendation and in substantial agreement with its reasoning, it was concluded that further proceedings on all of the charges in these cases were unwarranted in the circumstances.

It was concluded in agreement with the Region that in view of the relationship between the two multi-employer associations,[1] their threat of lockout on behalf of their employer members was privileged. It was also concluded, based upon the Region's findings, that the Associated had not conditioned contractual agreement upon a merger of certain trust funds. With respect to the allegation relating to the Associated's refusal to furnish the Union information as to the individual employers for whom it was bargaining, it was concluded that the Associated was not obligated to furnish this information[2] in the absence of a showing of need, as e.g., in circumstances where there was a privileged withdrawal of employers from association membership.[3]

* * * was concluded in substantial agreement with the Region that the evidence did not show that the Union had adopted a "take it or leave it" bargaining position. Instead, as indicated by the many bargaining sessions and the matters discussed there as shown by the bargaining minutes, the Union indicated a willingness to modify its wage proposals when the Employer increased its wage offer, but stated it considered voluntary overtime a "strike issue". While with respect to the Union's soliciting Associated members to sign individual contracts dur-

[1] Cf. *Evening News Association*, 166 NLRB 219.

[2] This information request related to the statute of the collective bargaining representative rather than to the 8(d) subjects of collective bargaining.

[3] It was also noted that here the Associated notified the Union that the employer withdrawals were ineffective.

ing the negotiations with the Associated, the Union's conduct was not viewed as privileged even though individual contracts were not signed, urging a violation on the basis of this conduct was considered unwarranted in the circumstances. In this regard, it was noted that only four of approximately 67 employees were solicited by the Unions, the solicitations were conducted without strikes for recognition or other substantial coercion,[4] and all the solicited employers refused to deal with the Union.

Likewise, with respect to the unilateral wage increases it was concluded that further proceedings were unwarranted even though it appears that the wage increases were not revoked. In this regard, it was noted that only 2 of approximately 67 employers instituted wage increases after the current contract expired, and it appeared that multi-employer contract negotiations would result in agreement that at least the amount of the increase given would be granted retroactively.[5]

In all these circumstances, and particularly in view of the extensive collective bargaining which occurred in these cases, it was concluded that all the charges should be dismissed, absent withdrawal.

[4] The strike threat made by local in connection with the solicitation of one member was considered to be an isolated incident insufficient to support the Section 8(b)(3) charge.

[5] Of course, if the Region finds on the facts that the parties were at impasse on the wage increase issue, and such increases were consistent with the Associated's wage offer, such increases would be privileged. *Empire Terminal Warehouse Company*, 151 NLRB 1359. However, *Empire Terminal*, in which wage increases *after impasse* were found privileged, should not be construed to equate unilateral wage increases with subcontracting as a permisable temporary stop-gap measure in the face of a threatened union strike.

February 28, 1969

In agreement with Region's recommendation and based on its fact findings, conclusions and reasoning[1] it was concluded that further proceedings were unwarranted in this case. Cf. *Darling & Co.* 171 NLRB No. 95; *Betts Cadillac Olds*, 96 NLRB 268.

ROF-1

[1] It was noted that the Region found that "the parties at a very early stage crystallized an economic difference which has persisted to date."

July 30, 1969

The case was submitted for advice on the question of the legality of the Employer's actions.

Based on the Region's fact findings and in agreement wtih its recommendations and reasoning, it was concluded that authorization of complaint was warranted to place the issues of the case before the Board.[1]

Enclosures: 3 ROFs

[1] *American Stores Packing*, 158 NLRB 620.

This case was submitted for advice because it involves doubtful legal issues.

FACTS

As a member of a multiemployer bargaining unit, Employer was party to a contract with the Charging Union which required that unresolved issues arising in the course of its renegotiations be submitted to the Council for final and binding decision. When impasse was reached in the renegotiation of this agreement, the disputed issues were submitted to the Council pursuant to the terms of the contract.

The council issued its decision on May 21, 1968, which the Union incorporated in a draft contract and mailed to employers in the multiemployer unit on June 6.

On June 16, the Union notified the Employer that its contract was being cancelled because of its 17-week delinquency in making the required payments to the fringe benefit fund, the contract having provided for its cancellation upon that contingency. However, neither the employer nor the Union took further action with respect to this cancellation notice and when the other unit employers signed the new contract on July 25, the union demanded that the Employer do so. The Employer declined, saying that he wanted to discuss it with his partner first. Hearing nothing from the Employer further, the Union filed the instant charge on July 29.

ACTION

It was concluded in agreement with the Region and based on its fact findings that the Employer's refusal to sign the collective bargaining agreement incorporating the findings of the Council constituted a violation of Section 8(a)(1) and (5) of the Act.

This conclusion did not require a determination whether the Employer would have violated the Act if it had refused to submit the bargaining dispute to the Council for a binding decision pursuant to the terms of the expiring agreement. Rather, it was based on the fact that

the Employer acquiesced in the submission of the dispute to the Council for a binding decision, on the fact that in the two months which followed the Council's issuance of its decision the Employer raised no objection to content of the contract and the manner of its determination, and on the fact that even after the 8(a)(5) charge alleging the Employer's refusal to execute the contract was filed, the Employer did not contend that the bargaining dispute had been improperly submitted to the Council.

In these circumstances, it was concluded that the Employer had agreed to be bound by the contract terms determined by the Council and was accordingly obligated to sign the contract upon request.

Nor was the Union's purported cancellation of the contract on June 17, 1968, considered to relieve the Employer of his obligation under Section 8(a)(5) to execute the agreement. As the parties were engaged in bargaining for a multiemployer unit, the Union's purported cancellation of the agreement would have constituted an attempted withdrawal from that unit for the purpose of bargaining with the Employer. Such a withdrawal from the multiemployer bargaining would be ineffective as untimely under the rule of *Retail Associates*[1] unless it had been accomplished by mutual assent of the parties to the agreement. However, the Union's subsequent demand that the contract be executed, made to the Employer before the Employer had in any way indicated its assent to withdrawal from the multiemployer unit, necessarily constituted a retraction of its earlier notification o fthe cancellation of the agreement. And the Employer's response to this demand for contract execution did not suggest it was accepting or relying on the Union's earlier purported cancellation of the agreement.

Accordingly, the Region was authorized to issue an 8(a)(5) and (1) complaint based on the Employer's refusal to execute the agreement.[2]

G. B.

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[1] 120 NLRB 388 (1958).

[2] Cf. *H. J. Heinz Co.* v. *NLRB*, 311 U.S. 514.

As submitted by the Region, the disputed issue is whether in the circumstances of this case the Employer's withdrawal from the multiemployer bargaining unit was timely in a situation involving a prematurely extended contract which was to take effect prior to the original termination date. The Employer has contended that, regardless of the outcome of bargaining between the Association and Union, it retains a right to withdraw during the 60-90 day period prior to that original termination date.[1]

In all the circumstances, it was concluded that the Employer violated Section 8(a)(1) and (5) of the Act by its attempted untimely withdrawal from multiemployer bargaining and its refusal to sign the agreement reached by the Association and the Union.[2]

At the outset it was noted that there is apparently no dispute that the Employer, prior to its attempted withdrawal here, was a member of the multiemployer Association and had manifested an intention to be jointly bound in bargaining.[3]

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[1] On the basis of the File submitted by the Region, it was not clear if the Employer raised this defense pursuant to an *express withdrawal* provision in the Master Agreement executed February 1, 1961, and incorporated in the 1965-1968 contract. The 8(a)(5) authorization contained herein is based on the assumption that the only relevant contract provision is a 60-day reopener clause, similar to the one found in the newly executed 1967-1970 agreement (Article 43). If there should in fact be an express contract provision relative to withdrawal rights in the 1965-1968 agreement, the case should be resubmitted for advice.

[2] The Region has found that the Board would assert jurisdiction over the Employer based on its Association membership. Subsequent to the charge herein the Employer filed an RM petition, currently blocked pending disposition of this case.

[3] In this regard it was noted that the Association has had collective bargaining agreements with the Union since at least 1961, covering a multiemployer bargaining unit; that the Employer was a member of the Association when purchased by Employer owner on January 1, 1963; that he became party to and/or accepted a contract then in effect between the Association and Union for a term from February 1, 1961 to December 41, 1963; and further that this contract was extended and, following its expiration on December 31, 1964, Employer owner signed a newly negotiated

It was further noted that in late October 1966, the Union sent letters to the Association and its members asking to reopen the contract, which was to expire February 28, 1968, for a cost-of-living increase. Actual talks with the Union did not start until July 1967. During the interim, Association officers and members discussed the Union's request among themselves, and held a meeting at which time a majority voted to seek a new contract to take immediate effect and to include a new terminal date, rather than limiting talks to a cost-of-living modification of the existing contract. The Region found that the Employer was not represented at this meeting, and that there is conflicting evidence as to when and how he was put on notice of the Association's decision. However, the Employer's owner admitted through his attorney that he "*was aware of the negotiations going on* but only 'through the grapevine' and his information and natural assumption was that *the contract being negotiated was to take effect on the expiration of the contract currently in force*, that is, February 28, 1968." (Emphasis added.) Thus, on the basis of the Employer's own statement, it is established that at some time prior to the completion of bargaining the Employer knew that a new contract was being discussed. Despite the Employer's position now that it had been intending "for a year or more" to withdraw from multiemployer bargaining upon the expiration of the 1965-1968 contract, at the time the Employer's owner became aware of new contract discussions his only action was to object to Association members about the enlarged scope of the negotiations. It was particularly noted that the Employer's owner gave no indication that he wanted to withdraw immediately from the multiemployer Association and bargaining unit, or that he intended to do so at the end of the current contract term. He made no attempt to reserve his purported right to withdraw during the 60-90 day period prior to

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Association contract with the Union for a period, January 1965 to February 28, 1968. If the foregoing facts are not supported by the evidence, the Region should so inform the Regional Advice Branch before proceeding on the above authorization.

that expiration date. He gave no notice that he would refuse to sign another Association agreement, nor did he revoke the Association's authorization to bargain in his behalf or give any notice to the Union of his position in this matter.

Finally, with respect to the Employer's contention that, during the negotiations, it thought the contract being negotiated was to take effect upon the expiration of the existing one, it was noted that the Employer, through its attorney, stated: *"Immediately upon his becoming aware that the contract was to be retroactive,* the Employer's owner raised objections to the president of the Association and later to Union representatives." (Emphasis added). The evidence is uncontradicted that Employer owner objections to the Union representatives were made after negotiations were completed and while the Union was attempting to obtain Employer owner's signature on the agreement.[4] However, the Association president states that Employer owner spoke to him "[a]bout May, June or July 1967, . . ." regarding his objections and this would substantiate a conclusion that the Employer was aware, while the bargaining was continuing that such bargaining was for a new contract which would take effect immediately rather than at the end of the existing contract term.

While it appears that no Board cases deal specifically with this issue, consideration was given to the Board's general statements regarding withdrawal from multiemployer bargaining in *Retail Associates, Inc.*, 120 NLRB 388, 393-395:

> The right of withdrawal by either a union or employer from a multiemployer unit has never been held, for Board purposes, to be free and uninhibited,

[4] The new contract was executed by the Union and Association officers on September 11, 1967 for a term, September 1, 1967 to October 15, 1970. Individual employer-member signatures were obtained after September 11, 1967, and futile Union efforts to obtain the Employer's signature continued throughout October and the first of November 1967. This was the first notice the Union had of the Employer's intention to withdraw from the bargaining unit.

> or exercisable at will or whim. For the Board to tolerate such inconstancy and uncertainty in the scope of collective-bargaining units would be to neglect its function in delineating appropriate units under Section 9, and to ignore the fundamental purposes of the Act of fostering and maintaining stability in bargaining relationships.
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>
> We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.

The fact that this case involved a prematurely extended contract was not considered to be such an "unusual circumstance" as to require special treatment. Thus, consistent with the approach taken in *Retail Associates,* it was concluded that where the Employer had *knowledge* during negotiations that some kind of new contract was being discussed by the Association and the Union (rather than simply a contract reopening for a wage adjustment) and where the Employer had an *opportunity to withdraw* at the time of its awareness, it may not wait to express its intention to do so until after bargaining is completed but must withdraw within a reasonable time after learning of the contract negotiations. Accordingly, it was concluded that although the negotiations between the Association and the Union to extend a contract took place about eight months prior to the expiration of that contract, the Employer, in view of its knowledge that a new contract was being discussed,[5] was not privileged to

[5] Even if, contrary to the conclusion reached above, the Employer thought the new contract was to take effect at the termination of

remain silent throughout the negotiations about its intention to withdraw from multiemployer bargaining upon the expiration of the existing contract, and later to exercise this right during the 60-90 day period prior to the original terminal date.[6]

Accordingly, it was concluded that a Section 8(a)(1) and (5) complaint is warranted based on the view that the Employer's withdrawal from the multiemployer unit was untimely and its refusal to sign the agreement reached between the Association and the Union was unprivileged.

G. B.

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the existing contract, such a belief was not deemed to excuse the Employer's silence; rather, the Employer's awareness that a new contract—regardless of its effective date—was being negotiated was concluded to give rise to the requirement that the Employer promptly announce its decision to withdraw from the multiemployer unit in order to render such withdrawal privileged.

[6] The premature-extension doctrine which would not bar a petition for an election during this period was not considered to require a different result.

December 30, 1971

Re: Western Graphic Arts Union Local 14
(The Standard Register Company)
Case No. 20-03-2521

LETTERS TO PARTIES FORWARDED
VIA CERTIFIED MAIL THIS DATE

John M. Capron, Esq.
Fisher & Phillips
26 Pryor Street
Atlanta, Georgia

Dear Mr. Capron:

Your appeal in the above matter has been duly considered.

The appeal is denied in part and sustained in part. It was concluded that inasmuch as it is well established that peaceful picketing by a minority union to compel recognition as exclusive bargaining agent does not violate 8(b)(1)(A) of the Act, further proceedings with respect to the 8(b)(1)(A) allegation was deemed unwarranted. *NLRB* v. *Drivers Local 639* (Curtis Bros., Inc.), 362 U.S. 274.

However, issues were raised which warranted Board determination with respect to the 8(b)(2) and (3) allegations. Accordingly, the case is remanded to the Regional Director for issuance of an appropriate 8(b)(2) and (3)

complaint, absent settlement. All further inquiries should be addressed the the Regional Director.

Very truly yours,

Peter G. Nash
General Counsel

/s/ Irving M. Herman
Irving M. Herman
Director, Office of Appeals

cc: Director, Region 20

Western Graphic Arts Union Local 14, Attn: Jack McCormick, Pres., 1269 Howard St., San Francisco, California
The Standard Register Company, 2101 Livingston, P.O. Box 23645, Oakland, California
Levy & Van Bourg, Attn: Victor J. Van Bourg, Esq., 45 Polk St., San Francisco, California

CERTIFIED MAIL

[Logo]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 March 31, 1972

Re: Beetle Plastics, Inc.
Case No. 16-CA-4627

Mr. Glenn D. Sorrell, Bus. Agent
International Union of Operating Engineers,
Local 670
66 Broadlawn Village
Ardmore, Oklahoma 73401

Dear Mr. Sorrell:

Your appeal in the above matter has been duly considered.

The appeal is denied. For substantially the reasons set forth in the Regional Director's letter of March 10, 1972, insufficient basis existed to establish that the Company had violated the Act in any manner encompassed by the charge. The evidence indicated that when Beetle Plastics took over Ameron's Ardmore operation in October 1971 it began operating it with a majority of its own employees and a few of Ameron's former employees. The evidence was insufficient to establish that its failure to rehire any of the remaining laid off Ameron employees was based on other than economic considerations. In these circumstances, since a majority of the employees employed by Beetle had never worked for Ameron,

Beetle was under no obligation to bargain with the Union as Ameron's successor. See *Tallakson's Ford* 171 NLRB No. 67.

Very truly yours,

Peter G. Nash
General Counsel

By /s/ Irving M. Herman
Irving M. Herman
Director, Office of Appeals

cc: Director, Region 16

Richard A. DuRose, Esq., Smith & Schnacke, Talbot Tower, Dayton, Ohio 45402
Beetle Plastics Incorp., Ardmore Industrial Airpark, Ardmore, Oklahoma 73401

CERTIFIED MAIL

Re: Case No. 16-CA-4627

Appeal from a refusal to issue an 8(a)(1)(3) and (5) complaint based on a charge filed by the International Union of Operating Engineers, Local 670, AFL-CIO, alleging in substance that the Company was the successor to Ameron Company, and as such bound by the collective bargaining agreement in existence, and that the Company had discriminatorially refused to hire a number of Ameron's former employees.

[Logo]

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 March 24, 1972

Re: Appalachian Power Co.
Case No. 5-CA-5430

Donald G. Logdson, Esq.
Hostler & Logsdon
Suite 401 L & S Bldg.
810 Quarrier St.
Charleston, West Virginia 25301

Dear Mr. Logsdon:

Your appeal in the above matter has been duly considered.
The appeal is denied. There was no evidence that the Company had agreed to a new collective bargaining agreement which included Section 2.3 of the prior contract. Rather, the evidence in companion Case No. 5-CB-1207 was deemed sufficient to establish that the Locals' re-

fusals to execute an agreed-upon contract which excluded Section 2.3 was violative of Section 8(b)(3) of the Act.

Very truly yours,

Peter G. Nash
General Counsel

By /s/ Irving M. Herman
Irving M. Herman
Director, Office of Appeals

cc: Director, Region 5

Appalachian Power Co., 40 Franklin Rd., S.W., Roanoke, Va. 24011
Int'l Bro. of Electrical Workers, AFL-CIO, P.O. Box 6551, Richmond, Va. 23230
I.B.E. Local 1376, c/o W. G. Feazelle, Box 463, Route 5, Roanoke, Va. 24014
I.B.E.W. Local 1182, c/o R. E. Wells, 401 Grove St., Lynchburg, Va. 24501
I.B.E.W. Local 1991, c/o D. C. Wiley, Glen Lyn, Virginia 24093
I.B.E.W. Local 2175, c/o E. E. Wyatt, P.O. Box 485, Lebanon, Va. 24266
I.B.E.W. Local 2235, c/o Kenneth Keatley, 111 Christian Rd., Beckley, W. Va. 25801
I.B.E.W. Local 1884, c/o C. L. Knight, 315 - 5th Ave., Glasgow, W. Va. 25086
(Continued on next page)

CERTIFIED MAIL

GENERAL COUNSEL'S MINUTE

Carpet Layers' Association of Greater Atlanta
Case No. 10-CA-9016

The Thomas Company
Case No. 10-CA-9033

Retail, Wholesale and Department Store Union, AFL-CIO
Case No. 10-CB-2011

Appeal from refusal to issue complaint based on 8(a)(1), (2) and (5) charges filed May 28 and amended June 10, 1971, in CA-9016, and on June 10 in CA-9033 by Carpenters Local 225, alleging in substantially the same language that the Carpet Layers' Association of Greater Atlanta (in CA-9016) and the Thomas Company, a member of the Association (in CA-9033)[1] had refused to bargain with Local 225, induced their employees to select RWDSU, dominated and interfered with the formation of RWDSU, given it financial support and attempted to enter into collective bargaining agreements with it, and discriminated against employees because of their union affiliation; and from refusal to issue complaint based on an 8(b)(1)(A) and (2) charge filed May 28, 1971, by Local 225, alleging that RWDSU had accepted assistance from the Association, permitted the Association to dominate it, and received financial and other assistance from the Association, and caused or attempted

[1] As a result of a Supplemental Investigation, complaint issued on October 1, 1971, in CA-9033, alleging that the Thomas Company had violated Section 8(a)(1) and (2) by interrogating and threatening and supporting RWDSU. Local 225 appealed the failure to issue complaint against Thomas Company based upon the *Midwest Piping* issue, that is, the Employer's recognition of RWDSU in the face of a rival representation claim.

to cause employers to discriminate against employees because of their union affiliation.

ACTION

Appeal as to CA cases denied in respect to 8(a)(5) allegations, and sustained as to 8(a)(1) and (2); sustained in CB-2011.

REASONS FOR ACTION

In view of the evidence, *infra*, that a valid question concerning representation existed with respect to the employees involved herein, insufficient basis existed to warrant a finding that the Association or any of its members had violated Section 8(a)(5) by refusing to bargain with Local 225.

However, issues were raised with respect to the 8(a)(1) and (2) allegations arising out of the relationship between the Association, its member firms and its agents, and the RWDSU, which warranted Board determination on the basis of record testimony. The evidence indicated that a number of the employees of all Employers in the Association were members of Local 225, and although original payment of dues and fees may have been made by the Employers, there was evidence that this money had been repaid by the employees and that they had continued paying dues themselves thereafter. Moreover, the Employers had been deducting dues for these employees for years and making payments for them to the Health & Welfare and Pension funds administered by the Carpenters, and, as recently as February 1971, had met with the Carpenters concerning the employees and the terms of their employment. Further, by the February 17, 1971 letter of the Association's attorney, Currie, the Association on behalf of the Employers had requested that the Carpenters bargain with them. Accordingly, it could not be said that the Employers were not aware of the Carpenters' interest in representing their employees, or that the Carpenters had no such interest.

Nor could it be said that no question concerning representation existed because the Carpenters' request for recognition as representative of the employees was for an inappropriate unit. Association attorney Currie's letter of February 17, which invited the Carpenters to bargain with it, read: "This Association has authorized us to notify you that they are prepared to meet at an early, mutually convenient time for the purpose of negotiating a labor agreement covering the appropriate employees of the Association." Therefore, when the Carpenters responded to the Association by telegram of May 27, demanding recognition, the Association could not ignore this request on the basis that it was for an inappropriate unit, since it was for the unit for which the Association had invited bargaining. And the language used in the demand, to wit, ". . . a majority of the carpet layers employed by employer members of the Carpet Layers Association," could not be read as limited to members of the Carpenters doing non-residential work simply because the Carpenters had previously, by oral agreement, represented only such employees. In these circumstances, the Employers were faced with rival claims for recognition and were obligated under the *Midwest Piping* doctrine to refrain from recognizing either Union until the bargaining representative could be determined by the Board; and the fact that RWDSU had cards from a majority of employees would not warrant a contrary conclusion, even absent the evidence here that at least some of them had been obtained through coercion. See *American Bread Company*, 170 NLRB 85. Accordingly, recognition of RWDSU and the negotiation of collective bargaining agreements with it violated Section 8(a)(1) and (2) of the Act.

The evidence further indicated that the Association, its constituent members, and its agent Currie[2] were bound together in this joint course of conduct which was calculated to deny employees their rights under Section 7 of the Act. The Association appeared to be the

[2] Footnote deleted as internal procedural instructions dealing solely with practices within the Agency which does not affect the public or the parties involved.

guiding force. It was the Association's attorney who solicited RWDSU's interest on behalf of the Association members and who provided it with the names of employees in each firm who would serve as contacts for organization. The Association's attorney answered the Carpenters telegram of May 27, 1971, speaking for the member firms, and negotiations between RWDSU and the Employers were conducted jointly, with the Association's attorney representing the Employers, and with substantially identical contracts resulting. Thus, even though the Association did not enter into a contract with RWDSU, it was as a result of its efforts that the individual members did. Accordingly, a complaint alleging a *Midwest Piping* violation of Section 8(a)(1) and (2) by the Association and its members was deemed warranted. *Teamsters Local 386*, 145 NLRB 1475.[3] Additionally, the evidence supported the conclusion that the direct assistance given RWDSU by the Thomas Company (already the subject of complaint in Case 10-CA-9033 in respect to such conduct) and the similar conduct on the part of Wilson were in furtherance of the overall scheme of support of RWDSU initiated by the Association in behalf of its member employers and thus was attributable to all. Accordingly, the complaint should also allege the conduct by both Thomas and Wilson as an integral part of the course of conduct begun by the Association.

Finally, in view of our conclusion that the Association and the Employers violated Section 8(a)(1) and (2) by unlawfully assisting and recognizing RWDSU, it would follow that the Union violated Section 8(b)(1)(A) by receiving and enjoying the benefits of such assistance.

[3] The amended charge in Case No. 10-CA-9016 was deemed broad enough in language and scope to support issuance of complaint against the Association and its member firms. Thus, while the charge named only the Association as the charged party, the body of the charge alleged that "[t]he employers have induced and encouraged . . . and have dominated and interfered . . ." and then listed all the members of the Association. Moreover, copies of the charge were * * *.

Connie Jean, Inc., 162 NLRB 1609; see also *Garment Workers Union* (Bernhard-Altmann Texas Corp.), 122 NLRB 1289, affirmed 366 US 731.

/s/ P. G. N.
Peter G. Nash
General Counsel

Dated: 12-17-71

GENERAL COUNSEL'S MINUTE

American National Stores, Inc.
Case No. 14-CA-6136

Appeal from refusal to issue complaint as to that part of an amended 8(a)(1), (3) and (5) charge filed April 20, 1971, by Retail Store Employees' Union, Local 655, which alleged that since about February 12, 1971, the Company had refused to recognize and bargain with the Union which is the exclusive representative of the unit employees, and unilaterally increased commissions, transferred employees and promised benefits to employees to discourage Union membership.[1]

ACTION

Appeal sustained as to the 8(a)(5) allegation and denied as to the 8(a)(1) and (3) allegations.

REASONS FOR ACTION

With respect to the 8(a)(1) and (3) allegations raised on appeal, insufficient basis existed to warrant a finding of violation.

As to the transfer to another store of leading Union advocate Butler, the evidence indicated that Butler first made his request for transfer to St. Louis in the late fall of 1970, long before the Union organizational activity in February 1971, and repeated the request thereafter, and that the timing of the transfer was caused by slow business and the resulting unavailability of a position in St. Louis until early 1971. Moreover, when Butler was

[1] The outstanding complaint alleges the following 8(a)(1) violations: the store manager told an employee he would run the store the way he wanted to and a union would make no difference; store manager told an employer that if the Union got in, no one would receive commissions on sales made by management; Company granted a benefit by implementing a change in distribution of commissions on sales by the manager.

notified of the opening he was asked if he still wanted to transfer and thus was given the option of not accepting it.

With respect to the transfer of the alleged anti-union employee Wood into the Rolla Store, the evidence indicated that Wood was transferred after the store where he had been General Manager was closed and that under the Company's policy of having two assistant managers in each store, the Rolla store was officially one man short before the transfer. Accordingly, it could not be established that the purpose of either transfer was to undercut the Union's majority.

As to the 1% increase in commissions for "O" category sales, the evidence indicated that the Company decided to increase the commissions for this category of sales before the Union made its demand for recognition, the increase was applicable to all stores without collective bargaining agreements, and the Company had announced the increase to employees at its store in Columbia, Missouri, one day before the Union made its demand.

However, in light of the conduct alleged as violative of 8(a)(1) in the outstanding complaint, the Company's refusal to recognize and bargain with the Union raised issues warranting Board determination on the basis of record testimony.

The outstanding complaint alleges that a Company representative created the impression of futility in selecting a bargaining agent by telling an employee he would run the store the way he wanted and a Union would make no difference; a Company representative threatened to withhold benefits by telling an employee that if a Union got in no one would receive commissions on sales made by management; and the Company granted a benefit by announcing to employeees and implementing a change in the method by which commissions on sales by the manager were distributed to employees in order to discourage Union activity. Moreover, the evidence established that this conduct occurred after three of the four employees in the unit had executed authorization cards, and the Company had refused the Un-

ion's demand for recognition and bargaining. Accordingly, in view of the small size of the unit, the Company's alleged conduct was deemed so pervasive and coercive at the time of its occurrence as to make a fair election doubtful, if not impossible. The facts that since the conduct in question there has been employee turnover and the employer apparently has refrained from committing new unfair labor practices would not warrant a contrary conclusion. See *Gibson Products*, 185 NLRB No. 74, slip opinion pp 3-5, where the Board stated:

> In *Gissel*, the Supreme Court affirmed, without qualification, the settled principle that a bargaining order is not rendered inappropriate by the circumstances that a union has, or may have, lost its majority status between the time of the commission of the employer's unfair labor practices and the Board's decision.
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>
> . . . the Court held that the Board could properly impose a bargaining order even though the Union may not in fact represent a majority of the current employee complement. It follows, therefore, that in determining whether the employer's unfair labor practices are of such a nature as to preclude a fair election and thus necessitate a bargaining order based on a past card showing of a majority status, the situation must be appraised as of the time of the commission of the unfair labor practices, and not currently.

Accordingly, the case was remanded to the Regional Director for the issuance of an appropriate amended complaint, alleging a violation of Section 8(a)(5) of the Act, absent settlement.

/s/ A. O.
Arnold Ordman
General Counsel

Dated: 1-4-71.

[Caption omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that the defendants appeal to the United States Court of Appeals for the District of Columbia Circuit from the Memorandum and Order entered on the 10th day of August 1972 granting plaintiff's motion for summary judgment, denying defendants' cross motion for summary judgment and ordering defendants to make available to the public pursuant to the Freedom of Information Act 5 U.S.C. 552, various internal memoranda and documents.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 73-1233

NATIONAL LABOR RELATIONS BOARD, ET AL., PETITIONERS

v.

SEARS, ROEBUCK & CO.

ORDER ALLOWING CERTIORARI—Filed May 28, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is set for oral argument in tandem with No. 73-1316.

Mr. Justice Powell took no part in the consideration or decision of this petition.

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Supreme Court, U. S.
FILED
MAR 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1233

NATIONAL LABOR RELATIONS BOARD and
PETER G. NASH, GENERAL COUNSEL,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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NATIONAL LABOR RELATIONS BOARD and PETER G. NASH, GENERAL COUNSEL,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent, Sears, Roebuck and Co. (hereafter "Sears")[1] opposes the issuance of a writ of certiorari to review the *per curiam* decision and judgment of the United States Court of Appeals for the District of Columbia Circuit which issued in this case on July 27, 1973 (Pet. App. A, p. 1a).

1. This suit was brought as a class action under Rule 23, F. R. C. P., by Sears on behalf of itself and other charging parties under the National Labor Relations Act. The District Court, however, concluded that it need not address the class question "[s]ince whatever relief this Court chooses to grant the plaintiff will necessarily be binding on the defendants as to all persons." Pet. App. C, p. 4a, n. 1.

QUESTIONS PRESENTED FOR REVIEW

Petitioner General Counsel—the only government agency here involved notwithstanding the petition's misleading references to the "National Labor Relations Board" and the "Agency"[2]—has presented an issue which has not been involved in the instant controversy. Accordingly, Sears is compelled to restate the matters that have been at issue in this case:

1. Whether, based on the evidentiary record, presented to the District Court, that Court erred by finding that the General Counsel, as an independent agency under the Freedom of Information Act, 5 U. S. C. § 552, *et seq.* (hereafter "the Act"), failed to demonstrate that certain of his determinations constituted exempt intra-agency memoranda rather than "final options" or "mandatory . . . instructions to staff that affect a member of the public" (Pet. App. C, p. 7a) which must be indexed and disclosed under the Act.
2. Whether after permitting the deletion of any affiants names or references to settlement strategy, the District Court erred by requiring the General Counsel to justify in writing, as required by the Act, all other deletions in the determinations he disclosed and by also requiring the disclosure of any documents incorporated by reference or necessary to explain said determinations.

COUNTERSTATEMENT OF THE CASE

The General Counsel possesses the sole power under the National Labor Relations Act (29 U. S. C. § 151, *et seq.*) to institute proceedings before the National Labor Relations Board

2. At the District Court, the General Counsel conceded, indeed argued, that he and his office constituted an independent Freedom of Information Act agency, and the District Court so found. Pet. App. C, p. 6a, n. 4. This fact must be emphasized in light of the petitioner's repeated use of the amorphous term "agency" which does not distinguish between the Board and the General Counsel and thereby confuses the issue. The correct caption, it is respectfully submitted, should have, as the sole petitioner, General Counsel Nash.

(hereafter the "Board"), and, as a result, controls an aggrieved party's access to the remedial processes of the Board. 29 U. S. C. § 153(d). As the independent agency vested with unreviewable authority, the General Counsel's decision as to whether to issue a complaint significantly determines the course of national labor policy.

By determining, for example, to dismiss a charge, the General Counsel can preclude Board review and thereby dictate the development of the law. See n. 9, *infra*. Sears commenced the instant action, on behalf of itself and other similarly situated persons, to obtain access under the Information Act to essentially two types of documents, which, Sears alleged, were decisions and instructions that determined if, and when, a remedy would be available under the Labor Act. The first documents, referred to as Advice Memoranda, were found by the District Court to contain the substantive agency law on "new questions arising in the field of labor relations" (Pet. App. C, p. 6a) which can, absent an appeal from an adverse determination, terminate action by the General Counsel. N. L. R. B. Statements of Procedure, §§ 101.6, 101.8. The other documents, referred to as Appeals Memoranda, were found to be final opinions which also set forth the action to be taken by the General Counsel as an independent agency. The procedures of the General Counsel, which result in the issuance of each of these documents, are described below.

A. The Advice Memoranda

An aggrieved person seeking relief from an unfair labor practice initiates agency action by filing a charge with one of thirty-six regional directors. N. L. R. B. Statements of Procedure, § 101.2. These regional directors act under the "supervision of the Office of the General Counsel" (N. L. R. B. Statement of Organization and Function, § 203.1) which has delegated to each regional director the initial authority, after investigating the charge, to decide whether to issue an unfair labor practice complaint and thereby commence proceedings before the Board. However, where the case involves novel or

certain complex legal issues periodically designated by the General Counsel, "the regional director . . . *must* submit the case for advice from the general counsel." N. L. R. B. Statements of Procedure, § 101.8 (emphasis added). In such "advice" cases, the regional director submits a statement of the facts and issues to a separate division of the Office of General Counsel, the Advice Branch in Washington, "along with the regional director's recommendations." Pet. App. C, p. 6a; see also e.g., the appendix below (hereafter "A") at 217-221. The Associate General Counsel in charge of the Advice Branch supervises the review of such "requests for advice and *formulates policy* on novel or unsettled procedural and *substantive matters* arising in unfair labor practice cases." Points and Authorities of Defendant in Opposition and in Support of Its Cross-Motion for Summary Judgment in the District Court, quoting from the N. L. R. B.'s Statement of Organization and Function, § 202.1.1 (emphasis added) at A. 190.

The process by which the Advice Branch "formulates" such "substantive policy" is well-established. The process, as described in great detail by the General Counsel to the House Subcommittee on the N. L. R. B.,[3] begins with a thorough study, which requires that a staff attorney "ascertaining the *applicability of prior Advice determinations*" and review of the regional file and any "*recommendations* formulated by the regional director" (emphasis added). Appendix A hereto, p. A4.[4] Oral argument by the parties is also granted in important cases such as the underlying Sears litigation here. The staff attorney then presents his views to an agenda of ranking members of the General Counsel's staff whose "decision is submitted to the General Counsel . . . together with any dissenting opinions . . . The General Counsel's *final determination* is [then] communicated to the Regional Office by way of an [Advice] memorandum for implementation." Appendix A hereto, p. A4; See, also Pet. App. C, p. 6a; A. 214; A. 223.[5] "In order to avoid any misunderstanding between the Regional Office and the Advice Branch, this memorandum ordinarily recites the facts upon which the Advice Branch relied in making its determination, the exact issue involved, instructions for the final processing of the case, and *a detailed legal rationale*, including any pertinent Board or Court decisions," Appendix A hereto, p. A4. (Emphasis added.)[6]

An aggrieved party, whose charge the Advice Branch has concluded does not constitute an unfair labor practice, thereafter receives a summary letter from the regional director notifying him that the regional director will dismiss his case if it is not voluntarily withdrawn. See, e.g., A. 24, but see A. 30 and A. 33. Such a refusal to issue a complaint may, in turn, be appealed to the General Counsel's Office of Appeals within ten days; however, the charging party is not permitted to see the Advice Memoranda whose decision he must appeal. Absent such an appeal, all agency action is entirely foreclosed. Of those who do choose to incur the additional expense of an appeal, only one in twenty succeed in obtaining issuance of a complaint and resultant access to the Board's processes.[6]

3. This presentation by the General Counsel, which the General Counsel conceded during oral argument below "basically" sets forth his current practices, is attached as an Appendix hereto.

4. The research is accomplished by utilizing an internal index of prior advice decisions which was only first made public during the course of this litigation. See, e.g., the repeated requests by the Labor Relations Law Section of the American Bar Association (hereafter "the Section") seeking such an index as found at Vol. II, 1970 Report of the Section, p. 7; Vol. II of the 1971 Report of the Section, pp. 233-237, 242-246; and Vol. II of the 1972 Report of the Section, pp. 217-220.

5. The General Counsel has conceded that only "rarely, if ever," does a regional director disregard an Advice decision. Pet., p. 4. Indeed, no evidence of even *a single instance* in which a regional director did not adhere to an Advice Branch decision was presented to the District Court by the General Counsel nor discovered by Sears in its extensive examination of Advice decisions (A. 104) and, at oral argument below, counsel for the General Counsel conceded that he knew of *no* instance where regional directors had refused to implement an Advice decision.

6. In its petition, the General Counsel continually refers to Advice Memoranda as containing settlement instructions and "security sensitive" material, but no examples of such documents were ever

B. The Appeals Memoranda

In the case of an appeal, the Office of Appeals, upon receipt of the regional file and the decision theretofore issued by either the Advice Branch or the regional director, follows a procedure similar to that utilized in the Advice Branch. Appendix hereto, pp. A11-14. An analysis of the facts, which are generally dispositive, along with a recommendation for the disposition of the appeal, is prepared and presented to an agenda comprised of the ranking members of the Office of Appeals. On the basis of the analysis and recommendations, the deliberations of the agenda and any oral presentation of the parties in important matters such as the Board case here, the decision of the Office of Appeals is made. This decision is reduced to an Agenda Memoranda or "Minute", which is cleared, "in the usual manner," through a Special Assistant to the General Counsel. The parties, however, are advised of the Appeals decision by a summary letter (Pet. App. C, pp. 7a-8a) which, if adverse, unless reconsideration is sought, closes the matter. Appendix hereto, p. A13.

C. The Instant Litigation

Following repeated denials by the General Counsel of Sears' request for access to Advice and Appeals Memoranda for utilization in a matter then pending before the Appeals Branch and now before the Board, the instant action was commenced in August 1971. In February 1972, nearly eight months after Sears first sought access to such decisions, the General Counsel announced that Sears would be provided a portion, but not all, of the information sought under certain specified conditions. Specifically, the General Counsel made available to Sears a theretofore secret index to Advice Memoranda in closed cases

adduced before the District Court nor uncovered by Sears. In addition, the examples of Advice Memoranda appended to the Statement of Undisputed Facts (A. 94-100), which contain no such references, were accepted as representative examples of Advice decisions. A. 57-58, ¶ 6.

only; those Advice Memoranda in closed cases which Sears selected from that index; and those Appeals Memoranda selected by Sears after it was required to examine the approximately 8,000 unindexed Appeals Memoranda which had issued in the last five years.[7] The General Counsel refused to produce, however, the Advice or Appeals Memoranda in any pending cases, including the underlying matter which triggered the litigation involving Sears.

The District Court concluded that, after consideration of the undisputed facts and review of the requested documents, the Advice and Appeals Memoranda were "instructions" affecting the public and "final opinions" which were required to be disclosed under the Act. Indices thereof were also required to be compiled and made available for Memoranda which had issued after the effective date of the Act. Finally, the District Court required that, subject to deletion of the names of affiants, settlement suggestions and other matters justified in writing, where the Memoranda expressly incorporated by reference other documents or explanatory material, that information was to be considered part of the Memoranda. Pet. App. C, pp. 8a-10a. This decision was affirmed, without opinion, by Judges Miller, Wright and Robb of the Court of Appeals in a *per curiam* decision on the basis of the District Court's decision and *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 482 F. 2d 710 (D. C. Cir. 1973) Pet. App. A, pp. 1a-2a.

7. Sears' analyses of the Appeals cases over the last five years revealed a 5% reversal rate, but in earlier years the rate was 6%. (Appendix hereto, p. A15.)

REASONS FOR DENYING THE WRIT

1. No Important Legal Issue Is Presented in the Instant Case: The Parties Do Not Dispute the Law but Its Application to the Peculiar Facts at Bar

Petitioner concedes that this Court has already resolved the basic legal question in this case in *Environmental Protection Agency* v. *Mink*, 410 U. S. 73 (1973), where this Court articulated the guidelines to be used in applying exemption 5 of the Act. Pet., pp. 10-11.[8] Accordingly, the case at bar merely presents an application of those principles to the unique set of facts involved in this case. In *Mink*, this Court stated clearly, and Petitioner does not dispute (see Pet., p. 11), that exemption 5 was to be "narrowly delimited" with the objective only of preventing injury "to the consultative functions of government" 410 U. S. at 87. The narrow scope of the exemption, accordingly, does not permit the withholding of documents which embody "the agency's effective law and policy . . . but [instead] only shields the Agency's group thinking process" as, e.g., the agenda process employed by the General Counsel. See Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 797 (1967). The District Court properly concluded, therefore, after examining the evidence, that the documents here, admittedly issued, at least with respect to Advice memorandum, to insure that

8. The petition also places reliance on exemptions 2 and 7 of the Act although it concedes that it did not urge either of those exemptions to the courts below. Pet., pp. 12-17. While it is manifestly inappropriate to now assert these exemptions, even if they are applicable, they do not provide, in any event, justification for non-disclosure. To argue, as does Petitioner, Pet. pp. 12-13, that simply including a final decision within an investigatory file automatically precludes disclosure, would permit the exemption to engulf the disclosure mandate of the Act. An investigatory file cannot be used to hide substantive declarations of law and policy. Exemption 2 is similarly inapplicable. See, e.g., *Stokes* v. *Brennan*, 476 F. 2d 699 (5th Cir. 1973) and *Hawkes* v. *I. R. S.*, 476 F. 2d 787 (6th Cir. 1972), rejecting the very claim advanced here.

new and novel questions are decided uniformly, were final orders and instructions of the General Counsel as an admittedly independent agency. Another agency or another set of documents may or may not be covered by the guidelines set forth in *Mink;* however, the instant case is but one factual application of those principles.

2. The Lower Court Correctly Applied the Law to the Instant Factual Circumstances

In *Kaiser* v. *Aluminum & Chemical Corp.*, 157 F. Supp. 939 (Ct. Cl., 1958), which petitioner concedes (Pet., p. 11) was expressly cited in *Mink* as evidencing the limited scope of exemption 5 intended by Congress, that exemption was construed, to cover only documents, which, unlike those here, were merely "opinions" from a subordinate to a superior that did not "reflect" or represent the position ultimately taken" by the agency. 157 F. Supp. at 493, n. 4. The instant case, however, presents a "different situation" (*G. S. A.* v. *Benson*, 415 F. 2d 878, 881 (9th Cir. 1969))—the disputed decisions here are issued by the agent that possesses the decisional authority and are, as are all orders from a superior to a subordinate, admittedly followed and implemented uniformly. Hence, "these are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be available to the public." *Sterling Drug, Inc.* v. *F. T. C.*, 450 F. 2d 698, 708 (D. C. Cir. 1971). The Act, as construed below, thus properly "enables an individual to conform his actions to the Agency's understanding of the law" (*Hawkes* v. *I. R. S.*, 467 F. 2d 787, 795 (6th Cir. 1972)) and permits "public criticism [that has] a salutary effect on the Agency and its staff." Davis, 34 U. Chi. L. Rev. at p. 778.

3. The Remainder of Petitioner's Claims Distort the Effect of the District Court's Decision

At present, the General Counsel is voluntarily disclosing and indexing the disputed memoranda in closed cases. This action implicitly concedes that such disclosure does not impede the Agency's administration. In addition, both the Act as well as the orders of the courts below permit appropriate deletions to be made from any documents to be disclosed. Indeed, the decision below arguably grants petitioner broader discretion than the Act would seem to permit by allowing deletions of settlement discussions and the names of affiants *without* the written justification which the Act would require. Accordingly, even assuming *arguendo*, that sensitive material is contained in the memoranda, a claim which was supported by no evidence in the court below, such material can be deleted if properly justified. The court below's disclosure order can in short, have only a minimal impact on the Agency's deliberate processes —especially when contrasted with the importance of disclosure to the Labor Bar and the public.[9]

9. The importance of this substantial body of administrative precedent, heretofore withheld from the public, cannot be minimized. The large majority of unfair labor practice charges are never permitted to reach the Board. It is for this reason that the American Bar Association has consistently urged the General Counsel to disclose Advice and Appeals decisions in order to effectuate the legislative mandate of the Act. As early as 1970, the Labor Law Section of the A. B. A. concluded:

> These [Advice and Appeals memoranda] constitute precisely the kinds of "final opinions, statements of policy and interpretations" and "instructions to staff that affect a member of the public," which the Freedom of Information Act contemplates should be indexed and made available to the public.

Vol. II, 1970 Report of the Section, p. 7; see also Vol. II, 1971 Report of the Section, pp. 233-237, 242-246; and Vol. II, 1972 Report of the Section, at pp. 217-220. More recently, the Section stated with respect to this litigation (Vol. II, 1973 Report, p. 244):

> We commend the General Counsel for making available advice and appeals memoranda in completed cases. However, in view of the decision of the district court in *Sears*, the General Counsel is required to make available all advice and appeals memoranda issued since July 5, 1967, and indices of the same. Your Committee continues to adhere to the view that where documents are expressly incorporated by reference in memoranda, they should be produced; that where memoranda rely upon "circumstances of the case" or some other vague or imprecise reference without delineating such circumstances, explanatory material should also be made available unless exempt under the Act; that the General Counsel should not delete material without fully explaining or justifying the basis for such deletion; and that unless there are clear extenuating circumstances, documents requested should be produced with reasonable promptness.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

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APPENDIX.

OPERATIONS OF OFFICE OF NLRB GENERAL COUNSEL

[The following statements explaining certain operations of the Office of General Counsel of The National Labor Relations Board were submitted by NLRB General Counsel on June 29, 1961 to a House Labor Subcommittee on the NLRB and are reprinted by the Commerce Clearing House at 1 Labor Law Reporter, ¶ 1150.01.]

Advising NLRB Regional Offices

A major segment of the General Counsel's policy-making functions is placed in the Regional Office Advice Branch which constitutes a subdivision of the Division of Operations. The Advice Branch is headed by an Assistant General Counsel, who, with the assistance of an Associate Branch Chief, supervises and coordinates the work of 24 attorneys.

Essentially, the function of the Advice Branch is what its name implies. It formulates for the approval of the General Counsel, uniform policies in novel, unsettled or ambiguous areas of the law and furnishes advice to the various Regional Offices regarding the appropriate course of action in specific cases.

The Branch processes approximately 130 cases per month which reach the Washington office through two main channels. First, Regional Directors, at their own discretion, may submit those cases for advice which, in the opinion of the Regional Director, present either novel or complex issues which the Regional Director wishes to have resolved by the Washington office. Similarly, where Regional Directors are confronted with either complicating Board or Court precedent, or believe that the specific area of the law is ambiguous, they may, at their discretion seek advice from Washington.

The second major channel of communication in this area involves those categories of cases which Regional Directors are required to submit for advice because they concern issues wherein a uniform policy determination is essential to the sound and fair administration of the Act. Essentially, those cases fall in the following categories:

1. Cases involving the interpretation of the recently enacted amendments to the National Labor Relations Act, such as Section 8(b)(7) of the Act which concerns recognition and organizational picketing; Section 8(e) of the Act, which outlaws hot cargo contracts; and Section 8(f) of the Act which exempts the building and construction industry from certain provisions of the Act.

2. Cases which involve the interpretation of major Board or Court pronouncements which require analytical study and subsequent uniform application. Examples of such situations are cases involving hiring halls in the maritime industry; the validity of certain union security provisions such as agency shop clauses in so-called right-to-work States; and certain remedial problems such as the disgorgement of illegally withheld union dues.

3. Certain building and construction industry cases. The submission of these cases for advice is required because the building and construction industry, by its very nature, has certain unique problems which have traditionally required the closest attention by the Washington office. To mention but one of these it is, of course, generally known that due to the temporary nature of building projects and the fluid labor force engaged in construction work, the Board has encountered considerable difficulties in holding representation elections among building and construction employees. From this, of course, flows a number of problems which make the uniform application of the Act in this particular industry extremely difficult.

From time to time, as definitive policy determinations are reached in Washington, many of these areas are redelegated to the Regional Directors and the submission of such cases for advice again reverts to the discretion of the Regional Director.

Regarding the mandatory submission of cases, those points should be emphasized. In the first place, the fact that certain cases, and these do not constitute more than approximately 5% of the total case load, must be submitted to the Advice Branch, must not in any way be construed as a lack of confidence in the Regional Director or the Regional Office staff. On the contrary, it is our opinion that the Regional Directors and their staffs are highly competent and are an integral and essential part of the General Counsel's policy-making function. Thus, cases submitted for advice are invariably accompanied by recommendations formulated by the Regional Directors and their staffs, thereby enabling the Washington office to fully utilize the experience and thinking of the entire Regional staff. However, it can readily be seen that if 28 regional directors were to interpret novel legal issues and apply these interpretations within the confines of their Regions without any coordination by the Washington office, the end result would indeed be chaotic. Thus, the law would be interpreted and applied in one way in New York and in an entirely different way in Chicago, or San Francisco, or Atlanta. It must be stressed, therefore, that the advice function supplied by the Washington office is essential to a fair and uniform administration of the Act.

Secondly, the Advice Branch does not ordinarily review the Regional Director's factual determinations and conclusions and it does not interfere with the investigatory duties of the Regional Office, but rather, concerns itself with the interpretation and application of legal principles.

So much for the functions of this particular Branch. The actual operations of the Branch are as follows:

Cases submitted by Regional Directors are assigned by the Branch Chief or Assistant Branch Chief to individual staff attorneys. The attorney, under the guidance and with the assistance of his supervisor, studies the Regional Office submission memorandum which sets forth the facts of the case, the issues on which advice is sought, and the Regional Office's recommended action.

The Advice attorney, in most cases, also reviews the case file in order to clarify any ambiguities or to ascertain whether there are other legal or factual issues which should be considered. The reviewing attorney researches all cases in point and ascertains the applicability of prior advice determinations in similar or related cases. Having been reviewed the case is then submitted for further consideration to an Agenda. This Agenda, depending on the complexity of the case, is attended by various members of the General Counsel's staff. Ordinarily the participants at the Agenda meetings are: the Assistant General Counsel in charge of Advice, the Associate Branch Chief, the Assistant General Counsel in charge of District Court Litigation, the Special Assistant to the General Counsel, the attorney and supervisor who reviewed the specific case, and in many instances, the Associate General Counsel in charge of the Division of Litigation. Again, depending on the complexity of the case, cases may be submitted to the Agenda orally or by written memorandum. However, all submissions to the Agenda include the Regional Office's recommendations, together with any concurrence or disagreement by the Advice Branch. The Agenda decision is submitted to the General Counsel by the Branch Chief or Associate Branch Chief, together with any dissenting opinions. In special cases involving extremely complex issues, the General Counsel may schedule special Agendas and invite other staff members to submit their recommendations.

The General Counsel's final determination is communicated to the Regional Office by way of a memorandum from the Advice Branch. In order to avoid any misunderstanding between the Regional Office and the Advice Branch, this memorandum ordinarily recites the facts upon which the Advice Branch relied in making its determination, the exact issue involved, instructions for the final processing of the case, and a detailed legal rationale, including any pertinent Board or Court decisions.

Because of the complexity or novelty of the cases submitted for advice, parties occasionally, and in approximately 1% of the

cases, seek personal conferences with the General Counsel or the Assistant General Counsel. Since it is of the utmost importance to understand fully the issues, as well as the positions of the parties in these cases, such meetings are ordinarily arranged. However, in order to avoid any semblance of ex parte proceedings, all other parties in the case are invariably and immediately notified of such meetings and are given an equal opportunity to meet with the General Counsel or the Assistant General Counsel and fully state their position.

It must be emphasized, of course, that the number of cases submitted for advice represents but a fraction of the overall case load handled by the Regional Offices. Thus, during the past two years an average of 10% of the total case load has been submitted for advice. In this respect, it is also noteworthy that although the Advice Branch concerns itself with the most complex and novel legal issues and does not review de novo the factual conclusions of the Regional Offices, the litigation success during fiscal year 1960 was 82%. It must also be noted, however, that during the first half of fiscal 1961, this litigation success was reduced to 63% of the cases so far decided by Board decision or Intermediate Report. The difference may well be explained by the fact that a large number of cases involving the Landrum-Griffin Amendments to the Act have not as yet reached Board or Court determinations, but have been decided in a variety of ways by individual Trial Examiners.

It should be noted that the Advice Branch, like other operations of the General Counsel, is concerned with a speedy resolution of the issues presented to it. However, while time targets have been set for the handling of advice cases, it is fully recognized, as in the time targets in the Regional Offices, that disposition of a case within the allotted time—10 days—is an aim and not a strait-jacket. Flexibility with respect to the time for handling of cases is an absolute necessity and is recorded in the day-to-day execution of the advice function. Thus, cases of great complexity and difficulty may often exceed the 10-day

period, while other cases with relatively simple fact and legal issues are handled in less than 20 days. Also, cases which have statutory priority, and especially 8(b)(7) cases wherein the Statute specifically stresses the expeditious resolution of the case, are handled in a much shorter period than 10 days.

It should also be noted that these time targets cannot and do not apply to cases which may be deferred pending decision in related cases by the Board, Supreme Court or Circuit Courts of Appeals. For example, "flag of convenience" cases which were required to be submitted for advice, had been deferred pending the Board's decision in the *West India Fruit* case [1961 CCH NLRB Decisions ¶ 9654]. Similarly, cases involving agency shop issues in right-to-work States, have been deferred pending the Board's decision in *General Motors* [1961 CCH NLRB Decisions ¶ 9663], a decision which is presently pending reconsideration by the Board. Also, as an example, cases involving the *News Syndicate* issue, recently decided by the Supreme Court [42 LC ¶ 16,889], were deferred pending the Supreme Court's disposition of this issue.

In addition to the above, cases involving identical or similar issues may be decided together so that, on occasion, a specific case may be delayed until another related case is ready for disposition. Such deferral of a case is, of course, done in the interest of uniformity in approach.

Despite the great flexibility in the time targets and the overriding consideration that on no occasion will quality of the decision be subordinated to a time target, the Advice Branch is able to show impressive gains in the speedy resolution of cases. Thus, in December 1958, the mean average for handling of an advice case was 29.3 calendar days. By December 1959, six months after General Counsel Stuart Rothman assumed office, this figure was reduced to 14.9. By June 1960, the mean average days for the processing of an advice case was 11.8 calendar days. By December 1960, this was reduced to 11.1, and by March 1961, the mean average was 10.9 calendar days.

Nature of the "Advice" Function

Since 1947, when the Office of the General Counsel of the National Labor Relations Board was created, some kind of advice function has been performed at the Washington level with respect, *inter alia*, to significant, novel or complex cases and cases where uniformity in approach was of particular importance.

Absent some kind of centralized advice section into which important novel and complex level issues can be channeled, the risk of chaotic development in the law would be marked. For, were Regional Directors left entirely free in this regard, each might proceed on his own view of a given legal question with the result that the law could, as a practical matter and before Board decision of the issue, be one thing in one Region and conflicting in others. Such a result would be at odds with the statutory purpose of encouraging stability in labor management relations. And the omission of selective control by the General Counsel, over these important cases would amount to a failure to exercise his statutory role in administering the law.

The advice function is recognized as particularly significant in view of the broad regulatory scope of the Labor Management Relations Act, which encompasses dynamic, interrelated, interacting and sometimes conflicting rights and privileges. Restrictions in one statutory section have often to be considered together with privileges recognized in another. To make the statute's regulatory intent and design meaningful in a complete sense, a uniform approach which keeps in mind all pertinent interests under the statute is necessary.

Also, with respect to the General Counsel's role in interpreting the statute and developing the law thereunder, it should be appreciated that when he authorizes formal proceedings in a case, he becomes an advocate for the theory underlying the complaint which he issues. While the General Counsel may, on occasion, present a theory to the Board for decision with

respect to which the General Counsel is not in entire agreement, this does not mean that any and every question of law must be or should be put to the Board. Nor does it mean that any legal question should be put to the Board, immediately such issue arises. It must be kept in mind that when litigation is begun on a given theory of law, there may be highly unsettling effects in labor management relations while the issue is wending its way through Board litigation and adjudication, Circuit Court adjudication and possible Supreme Court decision. While this is ordinarily a concomitant of any important litigation which has broad impact, such an effect must give one pause in beginning the litigation unless it is believed that there are very strong reasons under the statute to do so. This concern may also be important in deciding when, if at all, litigation of a particular legal issue should appropriately be instituted.

Finally, it should be noted that while the Regional Offices are performing their functions at an extremely high level of competence and dispatch, no one Regional Office deals with more than a fraction of the complex and novel legal questions which are channeled into the Advice Branch. Thus, the experience of having researched, analyzed and hauled generally similar problems of law permits the Advice Branch to supply reasoned, correct and uniform answers to questions which a Regional Director, acting alone, would find extremely troublesome.

What, then, are some of the sources, criteria and factors considered in deciding cases submitted for advice? Many factors may be considered, dependent on the issue posed, and the advice decision may, on occasion, represent a balancing of such factors. In some cases, the course to be taken is clear while in others, it may not be. But in all cases a carefully reasoned basis exists for the conclusion and recommendation reached. Among the sources and factors which may be considered in reaching a conclusion in a given case are:

1. Supreme Court decisions;
2. Controlling Board law;

3. Court law where the Board position is not to the contrary;
4. Clear statutory language;
5. Legislative history;
6. The general policy of the Act;
7. The ascertainable purposes of the particular statutory sections involved in the case;
8. The impact of the alternative courses on settled law;
9. The individual case as an appropriate vehicle for testing a given issue;
10. The time and circumstances under which the issue arises in relation to the developing Board law; (This may include seeking reexamination of prior Board decisions.)

Examples of the utilization of each or combinations of these criteria could be readily given. In the interest of brevity, however, only one problem, but a highly important one, is discussed as an example. The question for advice was the disposition of concurrent charges of 8(a)(5) and 8(b)(7)(C) violation.

In considering the problem of the concurrent 8(b)(7)—8(a)(5) case, the primary alternatives were, on the one hand, to take the position that despite the existence of a meritorious 8(a)(5) case, the union's picketing to protest this illegal refusal to recognize and bargain nevertheless violated Section 8(b)(7). On the other hand was the alternative of deciding administratively that a Section 8(b)(7) charge lacked merit if the employer who was being picketed was illegally refusing to bargain with the union.

The procedure, recommended to and adopted by the General Counsel, was to defer proceedings on an 8(b)(7) charge where the employer involved, was concurrently and illegally refusing to bargain, as determined by an investigation of an 8(a)(5) charge. This was considered to be warranted in view of the highly unsettling effect the alternative procedure would have, particularly with respect to the rights of employees and unions

recognized under Wagner and Taft-Hartley. The alternative procedure, as noted, was to process concurrently the 8(b)(7) charge and the 8(a)(5) charge, thus requiring an injunction of the union's picketing while simultaneously taking the position in the 8(a)(5) case that the employer was *illegally withholding recognition* from the union. For reasons noted, the General Counsel was reluctant to adopt this position until some guidance could be obtained from Board's decisions in the 8(b)(7) area.

The General Counsel's approach, which was upheld in the court litigation of *Scott* v. *Rothmen* [41 LC ¶ 16,535],[1] has, in effect, sought to maintain privileges of employees and labor organizations until such time as the Board would indicate that such privileges were negated by the enactment of Section 8(b)(7).

It should be noted further that the 8(b)(7)—8(a)(5) cases, considered as an integrated fact situation, have not been deferred or suspended. Rather, the basic dispute, i.e., the employer's refusal to recognize the union, has been litigated before the Board. What has not yet been litigated in these situations is the question of whether a union is privileged to picket in protest of the employer's illegal refusal to bargain.

In some of the recent decisions of the Board, there is language in the majority opinions which suggests that an 8(b)(7) and 8(a)(5) violation can exist concurrently. *Charlton Press*, 130 NLRB No. 90 [1961 CCH NLRB Decisions ¶ 9717]. However, the issue is still not free from doubt, particularly since a motion for reconsideration has been filed in that case.

When the Board has finally spoken in the *Charlton Press* case, the procedure the General Counsel should adopt may well become clear. However, in view of its highly unsettling effect on labor relations generally, and its impact on settled law prior to enactment of 8(b)(7), proceeding on 8(b)(7) charges in the situations discussed above was not believed warranted absent some indication from the Board that concurrent processing of 8(b)(7)

and 8(a)(5) charges was contemplated and required by the new section.

Nature, Function and Administrative Operation of Office of Appeals

Under Section 102.19 of the Board's Rules and Regulations, provision is made for an appeal to the General Counsel from the refusal by a Regional Director to issue complaint. Whenever such refusal occurs, the Director so advises the charging party in writing, briefly stating the reason for his action, informing the party of his right to appeal and the date by which the appeal must be filed, and noting that additional time will be granted on a showing of necessity. Copies of the above letter are sent to all parties concerned. It should be emphasized at this point that the standard operating procedure applicable to all regional offices requires that the charging party be fully apprised of the reasons for the refusal to issue complaint prior to the sending of the letter. This procedure is designed to afford the charging party the opportunity to discuss the issues and offer further evidence prior to formal action, and to enable him to prepare his appeal intelligently in the event the regional office adheres to its position in the matter.

When an appeal is filed it is referred to the Office of Appeals which acknowledges its receipt, sending copies of the acknowledgement to all other parties and attorneys of record. The Regional Director with whom the Rules require a filing of a copy of the appeal, then forwards the entire regional office file to the Office of Appeals together with his comments concerning the position taken by the charging party in his request for review. While the file and comments are usually forwarded within 3 days of the receipt of the copy of the appeal, the Regional Director may in his discretion defer submission pending further investigation if such action is deemed necessary to resolve issues raised by the charging party in his appeal. Moreover, if, upon

further investigation, evidence is disclosed which, in the judgment of the Director, supports an unfair labor practice finding, he has the authority to withdraw his dismissal letter and issue complaint. In this event, all parties concerned are advised by the Office of Appeals that it is closing its file in the matter.

Upon receipt by the Office of Appeals of the regional office file and comments, the entire matter, including any statement which a respondent may care to submit, is assigned to a staff attorney for study. The latter, after examining the file and all relevant documents in detail, prepares a memorandum which contains a statement of the facts, an analysis of the factual and legal issues involved, and a recommendation for disposition of the appeal. The matter is then reviewed by a supervisor. Effective supervision is guaranteed by not assigning more than three attorneys to any supervisor. Any disagreement between the attorney and the supervisor is noted in the memorandum.

In due course the case is scheduled for consideration by the Appeals Committee, consisting of the Director and Associate Director of the Office of Appeals and a third top staff member, with a combined experience with the Agency totalling over 40 years. No staff personnel participating in the determination of an appeal have had any connection with the case at any earlier stage.

The Appeals Committee meets twice each week to consider a case agenda prepared sufficiently in advance to afford Committee members the opportunity to read the memoranda and familiarize themselves with the cases. Each case on the agenda is considered in detail with both the attorney and supervisor freely participating in the discussion and expressing their views. If, in the judgment of the members of the Committee, the file does not contain sufficient information to permit a resolution of the issues in dispute, the case is remanded to the regional office with instructions to conduct such further investigation as is necessary to obtain the information in question.

If a party or his attorney in a given case desires an opportunity to present his views in person, a meeting is arranged for this purpose with equal opportunity being accorded to the other side. In cases where such meetings take place, a file memorandum is prepared by the responsible attorney setting forth the views expressed by the various parties concerned, and, in situations where it is deemed appropriate, a copy of this memorandum is forwarded to the regional office for comment.

On the basis of the original case analysis memorandum, the deliberations of the Appeals Committee, and upon any oral presentation made by the parties, the Committee makes its decision. This decision is reduced to the form of a "General Counsel's Minute" which covers the relevant facts and the reasons for the decision. This minute is cleared, in the usual case, through the Special Assistant to the General Counsel. When a case presents a novel or especially difficult problem, involves a policy issue, or is one in which there is disagreement among top-level staff personnel, the case is discussed in detail with the General Counsel who, in effect, reconvenes the Appeals Committee and participates in its further deliberations.

All parties concerned and their attorneys are advised of the decision by letter. While this ordinarily closes the matter, requests for reconsideration are entertained. In such instances, the evidence in its entirety is carefully reviewed in the light of reasons advanced by the charging party in support of his request and all interested parties are notified of the disposition of the matter.

From what has been said above, it is clear that every effort has been made to provide "administrative due process" in the handling of appeals cases. I want to assure the Committee, however, that this Office is keenly aware of its continuing responsibilities in this area. To this end, a study is currently under way to determine whether any improvements can be made in our case handling processes. In this connection, I have recently taken the opportunity to reemphasize to all Regional Directors

and Officers-in-Charge the necessity of making certain not only that a charging party is fully informed concerning the region's position prior to the issuance of the formal dismissal letter, but that if such information is conveyed orally the charging party fully understands the basis for dismissal, and that if the Regional Director has any doubt that such understanding exists, the reasons for dismissal must be expressed in the dismissal letter itself.

Office of NLRB General Counsel

At this point, I would like to address myself to the suggestion, which witnesses have made to the Committee, that all cases involving factual issues should be sent to hearing before a trial examiner rather than dismissed administratively. Since the vast majority of cases do present factual issues of one kind or another, and only some of these involve credibility, as discussed in Appendix C [not published], adoption of the suggestion would have required in fiscal 1959, for example, the issuance of complaint in almost 10,000 additional cases. The serious impact that such a course would have had on the Agency's already heavy backlog, with only 2,100 complaints issued during that year, is obvious. Moreover, I am at a loss to understand the justification for adopting a different standard for the Board's operations from that which is applicable to other governmental agencies, including district attorneys, whose day-to-day operations require the making of credibility resoultions in deciding whether to proceed in a given case. In my view, not only would such a procedure impose an undue and unreasonable burden of litigation on respondents, employers and unions alike, merely because someone, uninhibited even by the deterring costs confronting a private litigant, sees fit to file a charge however lacking in merit, it would also cripple the processes of the Agency by producing untold delay, with its consequent effect on the parties, in a field where the very proponents of this procedure recognize that time is peculiarly of the essence. I cannot believe, for example, that those who espouse the indiscriminate issuance of complaints have given sufficient thought to the effect such course would have in preventing a prompt resolution of questions concerning representation through the filing of blocking charges. More specifically, the indiscriminate issuance of meritless complaints would effectively prevent the holding of representation elections with the necessary consequence of leaving unsettled industrial relations in very broad areas of our economy. In fact, such indiscriminate issuance of complaints could effectively nullify the representation machinery of the Act and negate the legislative policy of fostering industrial peace.

The suggestion has also been made that the relatively small number of cases in which the Regional Directors' refusals to issue complaint have been reversed on appeal supports the contention that the Office of Appeals is "rubber-stamping" the Directors' action. The Committee should bear in mind in this connection that the percentage of reversals (on the average about (6%) will necessarily be small since all of the cases on appeal have been subjected to careful evaluation at the Regional Office level by top-echelon field personnel, the great majority of whom have had long years of experience and proven integrity and ability, [which] provides a firm guarantee that the decision in every appeals case is made on the basis of a careful *de novo* evaluation and review of the evidence disclosed by the field investigation. In the final analysis it is the character and caliber of the men who perform the function more than the structure that determine its quality and fairness, which constitute at once the objective and foundation of due process.

Supreme Court, U. S.
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No. 73-1233

In the Supreme Court of the United States

OCTOBER TERM, 1974

NATIONAL LABOR RELATIONS BOARD AND PETER G. NASH, GENERAL COUNSEL, PETITIONERS

v.

SEARS, ROEBUCK AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The court of appeals rendered no opinion; its judgment (Pet. App. A, pp. 1a–2a) [1] is reported at 480 F. 2d 1195. The memorandum and order of the district court (Pet. App. C, pp. 4a–10a) are reported at 346 F. Supp. 751.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1973 (Pet. App. A, p. 1a). A timely peti-

[1] "Pet. App." refers to the appendix to the petition, "Op. App." to the appendix to respondent's brief in opposition to the petition, and "A." to the separate appendix printed pursuant to Rule 36.

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tion for rehearing *en banc* was denied on September 13, 1973 (Pet. App. B, p. 3A). On December 6, 1973, the Chief Justice extended the time to file a petition for a writ of certiorari to February 11, 1974. The petition was filed on that date and was granted on May 28, 1974 (A. 214). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The provisions of the Freedom of Information Act, 5 U.S.C. 552, are set out in the appendix to this brief, *infra*, pp. 53–56.

QUESTION PRESENTED

Whether the Freedom of Information Act requires the disclosure of internal agency memoranda authorizing or refusing to authorize the prosecution of cases before the adjudicatory branch of the agency, and discussing the evidence and the legal theories upon which the prosecution should be based.

STATEMENT

A. THE PROCEDURE FOR PROCESSING UNFAIR LABOR PRACTICE CHARGES

In the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*), Congress separated the National Labor Relations Board into two main functional divisions—an adjudicating side and a prosecuting side. The adjudicating side, the National Labor Relations Board, is assigned, *inter alia*, the task of adjudicating unfair labor practice cases, subject to review by the federal courts of appeals. 29 U.S.C. 153, 160. The prosecuting side is the General

Counsel and his staff. This case involves the discoverability, under the Freedom of Information Act, of memoranda generated by the General Counsel.

Under the Labor Act, the General Counsel has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [of the Act], and in respect of the prosecution of such compliants before the Board * * *." Section 3(d), 29 U.S.C. 153(d). The General Counsel's function with respect to unfair labor practice charges is like that of an attorney general or a United States Attorney[2] (see 93 Cong. Rec. 6859, remarks of Senator Taft). The General Counsel has delegated the power to decide, initially, whether a complaint should issue on a given unfair labor practice charge to the Board's 31 Regional Directors. National Labor Relations Board, Organization and Functions, Section 203.1, 32 Fed. Reg. 9589; National Labor Relations Board, Statements of Procedure (hereafter "Statements of Procedure"), Section 101.4, 29 C.F.R. 101.4.[3]

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[2] In making the decision whether to issue a complaint, the General Counsel acts independently of the Board. 29 U.S.C. 153(d). In the prosecution of complaints he is a litigant before the Board, rather than its legal representative or advisor. National Labor Relations Board, Statements of Procedure, Section 101.12(a), 29 C.F.R. 101.12(a). The Board has its own staff of legal assistants, who are not part of the General Counsel's staff, to aid it in its decision-making. National Labor Relations Board, Organization and Functions, Section 201, 32 Fed. Reg. 9588. After the Board has acted, the General Counsel represents the Board in the federal courts of appeals in respect to petitions to enforce or set aside its orders. *Id.*, Section 202, 32 Fed. Reg. 9588–9589.

[3] Section 3(d) of the Act, 29 U.S.C. 153(d), provides that the General Counsel shall exercise general supervision over the officers and employees in the regional offices.

Upon the filing of a charge, an investigation is conducted by a member of the regional office staff. During that investigation, statements may be secured from representatives of the parties and other potential witnesses, and documentary evidence may be assembled. Statements of Procedure, Section 101.4, 29 C.F.R. 101.4. If, on the basis of the evidence gathered, the charge appears to have merit, and if settlement efforts are unsuccessful, the Regional Director issues a complaint setting forth the acts alleged to constitute unfair labor practices. Statements of Procedure, Section 101.8, 29 C.F.R. 101.8; National Labor Relations Board, Rules and Regulations (hereafter "Rules and Regulations"), Section 102.15, 29 C.F.R. 102.15. If the Regional Director concludes that the charge is without merit, he declines to issue a complaint and so informs the parties by a letter setting forth a brief statement of the reasons for his action and advising the charging party of his right to appeal to the General Counsel. Statements of Procedure, Section 101.6, 29 C.F.R. 101.6; Rules and Regulations, Section 102.19, 29 C.F.R. 102.19.

In certain cases, however, before disposing of a charge, the Regional Director refers some or all of the issues presented to the General Counsel's Division of Advice in Washington, D.C. Statements of Procedure, Section 101.8, 29 C.F.R. 101.8. A case is submitted for advice if the Regional Director believes that it presents novel or complex problems, or if it involves issues which the General Counsel has specified should be submitted in the interest of insuring the development of a uniform prosecutorial policy. The request for advice is transmitted by a memorandum, which

details the facts developed and the issues on which advice is sought. In many cases, the contents of the regional office investigatory file on the case are transmitted along with the request for advice. "Operations of Office of National Labor Relations Board General Counsel," Op. App., pp. A3–A4 (hereafter "Operations").[4]

Upon receipt of a request for advice, attorneys in the Division of Advice consider the issues presented in the light of the evidence gathered in the investigation, and prepare a memorandum (the "advice memorandum") which is reviewed by the head of the Division of Advice or one of his assistants and is sent to the Regional Director (see *e.g.* A. 83–88, 185–189, 192–198). The memorandum is signed by the Associate General Counsel in charge of the Division of Advice. It may advise the Regional Director to dismiss the charge, to issue a complaint thereon, to proceed at his discretion, to seek a settlement, or to conduct a further investigation. The memorandum sets forth the reasons for the recommended action and, if it recommends issuance of a complaint, it may discuss possible factual and legal defenses, trial tactics, and a basis for settlement. Prior advice memoranda are occasionally referred to in an advice memorandum and sometimes even attached to it, but they serve only to amplify certain points in the discussion of the case

[4] "Operations" is a series of statements which was submitted by the General Counsel on June 29, 1961, to a House Labor Subcommittee on the National Labor Relations Board.

under submission. They are not used or cited as precedents, for the controlling law is the decisions of the Board and the courts (see A. 175)[5] (See generally Quarterly Report on Case-Handling Developments, *Labor Relations Yearbook* (BNA, 1968) 283–284; Operations, *supra,* Op. App., pp. A8–A9.)

When received by the Regional Office the advice memorandum becomes part of the office's investigative file (A. 19). Following receipt of the memorandum, the Regional Director disposes of the charge. While the Regional Director rarely, if ever, disregards advice on legal issues, he makes the ultimate decision whether to issue a complaint and in what form. The advice memorandum is not referred to either in the complaint or in any other communication, such as the dismissal letter (*supra,* p. 4), Which the Director may send to the parties (A. 29–30), and is not made public.

If the Regional Director decides not to issue an unfair labor practice complaint, his decision may be appealed to the General Counsel, regardless of whether a case has previously been submitted to the Division of Advice. Statements of Procedure, Section 101.6, 29 C.F.R. 101.6; Rules and Regulations, Section 102.19(a), 29 C.F.R. 102.19(a). When such an appeal is taken, "the entire file in the case" is sent to the General Counsel's Office of Appeals, where it is reviewed by staff attorneys. Statements of Procedure, Section 101.6, 29 C.F.R. 101.6. The party taking the appeal files a statement setting forth the facts and reasons

[5] A skeletal subject matter index to these memoranda is maintained in the Division of Advice (A. 43).

supporting the issuance of a complaint, and, if leave is granted, may make an oral presentation to the Office of Appeals staff. If an oral presentation is allowed, other parties are notified and are given the opportunity to make their own oral presentation in separate meetings with the staff; however, no hearing with opposing parties present at the same time is held. Statements of Procedure, Section 101.6, 29 C.F.R. 101.6; Rules and Regulations, Section 102.19(b), 29 C.F.R. 102.19(b).

After the entire case file is reviewed by the Office of Appeals in the light of the parties' written and oral presentation, the General Counsel may affirm the Regional Director's refusal to issue a complaint, in which case a letter will be sent to the parties stating the grounds of the affirmance. Statements of Procedure, Section 101.6 29 C.F.R. 101.6; Rules and Regulations, Section 102.19(c), 29 C.F.R. 102.19(c); A. 199–204. No internal memorandum is prepared after such a decision; the Regional Director is simply sent a copy of the letter sent the parties (A. 94–95).[6]

If, however, the General Counsel concludes that further proceedings on the charges are warranted, the parties are so informed by letter, and a memorandum ("the appeals memorandum")[7] is sent to the Regional

[6] Prior to April 1971, a separate memorandum was prepared and sent to the Regional Director when his refusal to issue a complaint was sustained (A. 94–95).

[7] Within the Agency this memorandum is titled the "General Counsel's Minute" (A. 205–212). The district court incorrectly identified it as the "agenda minute," a term which has been used for memoranda prepared by Office of Appeals attorneys to serve as a basis for discussion of the appeal. The latter memoranda are not sought in the present case (Pet. App. C, p. 7a).

Director. This memorandum, like the comparable advice memorandum, sets forth the reasons why a complaint should issue, and often discusses matters related to its prosecution—*e.g.*, credibility of evidence, desirability of seeking further evidence, and legal arguments for reconciling the theory of the complaint with existing Board precedent (A. 205–212).[8] Upon receipt of this memorandum, the Regional Director, unless there is a settlement, issues a complaint. The memorandum is retained in the Regional Office file for guidance in prosecuting the case.

B. THE UNDERLYING UNFAIR LABOR PRACTICE CASE

On April 6, 1971, Sears, Roebuck and Co. ("Sears") filed a charge with the Board's regional office in Seattle, Washington, alleging that the Retail Clerks Union, Local No. 4, was violating Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. 158(b)(3), by refusing to bargain with Sears individually and insisting, instead, that Sears bargain in a multi-employer unit. After investigation, the Regional Director submitted the case to Washington for advice. Thereafter, by letters dated June 10 and July 26, the Regional Director notified Sears that he was refusing to issue a complaint on the charge because Sears' "attempted withdrawal from the [multi-employer association] was untimely, in that the investigation disclosed negotiations were already in progress at the time of the attempted withdrawal"; the Director cited

[8] These memoranda have no precedential significance and have never been indexed in any manner. They have been filed simply by case number and never by subject matter (A. 43, 20).

several Board cases as authority for his decision (A. 12–13, 21–23).

Sears appealed the Regional Director's decision to the General Counsel and, on August 20, the Acting General Counsel [9] reversed the Regional Director and ordered the issuance of a complaint. The Acting General Counsel ruled that the issue raised—whether a preliminary exchange of written proposals constituted a commencement of multi-employer negotiations—warranted Board determination (A. 32–33). An unfair labor practice complaint issued on September 1, 1971 (A. 34–37).[10]

C. THE FREEDOM OF INFORMATION ACT CASE

Before filing an appeal from the Regional Director's refusal to issue a complaint, Sears, relying on the Freedom of Information Act (hereafter FOI Act), requested that the General Counsel make available to it: (1) the memorandum prepared by the Division of Advice advising the Regional Director with respect to Sears' unfair labor practice charges; (2) all advice and appeals memoranda for the past five years which involve issues similar to those in the instant case; and

[9] The Acting General Counsel at that time was Eugene G. Goslee. On August 24, 1971, Peter G. Nash assumed the duties of General Counsel (A. 38, 40).

[10] On April 11, 1974, the complaint was withdrawn by the Regional Director following withdrawal of the underlying unfair labor practice charge by the charging party. See Rules and Regulations, Section 102.18, 29 C.F.R. 102.18. This does not affect the continuing vitality of Sears' demands under the Freedom of Information Act, which transcend this particular case (*infra*, pp. 13–52).

(3) any index or digest of advice and appeals memoranda (A. 14–17). That request was denied by the Acting General Counsel on the ground that the "memoranda do not constitute a final disposition of a case but are rather guides for a Regional Director as to how a specific case is to be handled" (A. 19). The General Counsel also claimed that the materials were exempt from disclosure under Exemptions 5 and 7 of the FOI Act, *ibid.* See also A. 24–28, 29–31.

Sears then filed a complaint, which it subsequently amended, in the United States District Court for the District of Columbia under the FOI Act, seeking disclosure of the requested material (A. 4–11). The General Counsel [11] answered, requesting that the amended complaint be dismissed (A. 38–41), and the parties filed cross-motions for summary judgment (A. 142, 143).[12]

[11] The suit was brought against both the National Labor Relations Board and its General Counsel. However, since the materials sought are all produced within the Office of the General Counsel, and the adjudicative side of the Board is not involved, petitioners will hereafter be referred to as "the General Counsel."

[12] On February 3, 1972, General Counsel Nash announced that, although the FOI Act did not require advice and appeals memoranda to be disclosed, he would voluntarily make such memoranda available in closed cases—*i.e.*, where appeal rights had been exhausted or a Board decision and order had issued—since such disclosure then would not interfere with the prosecution of cases. To protect future enforcement efforts, he added the provisio that "[w]e will delete from these memoranda all identification of witnesses, confidential sources of information and matters of a 'security sensitive nature.'" (A. 42–44.)

D. THE DECISIONS BELOW

The district court granted Sears' motion for summary judgment (Pet. App. C, pp. 4a–10a).[13] It held that advice memoranda are "instructions mandatory in substance if not in form," and thus constitute "instructions to Staff that affect a member of the public" under the FOI Act, 5 U.S.C. 552(a)(2)(C) (Pet. App. C, p. 7a); that appeals memoranda are "final opinions" under that Act, 5 U.S.C. 552(a)(2)(A) (Pet. App. C, p. 9a); that neither were "intra-agency" memoranda within the meaning of Exemption 5, 5 U.S.C. 552(b)(5) (Pet. App. C, pp. 8a–9a); and that documents incorporated by reference in advice and appeals memoranda, "though possibly qualified for a Sec. (b) exemption taken separately, * * * lost their exempt status by incorporation" (Pet. App. C, p. 8a).[14]

[13] Earlier in the litigation, the district court granted Sears' request for a preliminary injunction staying the Board proceedings on the unfair labor practice complaint pending resolution of its FOI Act claims. The court of appeals reversed that order. *Sears, Roebuck and Co.* v. *National Labor Relations Board*, 473 F. 2d 91 (C.A.D.C.), certiorari denied, 415 U.S. 950. That matter is not at issue in the present case.

[14] Although the materials originally sought by Sears comprised only advice and appeals memoranda, together with indices, Sears' motion for summary judgment encompassed "underlying documentation" from Regional Office files as well (A. 51–52). In an affidavit filed with the district court, counsel for Sears complained that memoranda voluntarily made available to Sears by the General Counsel (see note 12, *supra*) could be adequately understood only in the light of documents in the case files and that the General Counsel had denied requests for such documentation (A. 137–139).

The district court ordered the General Counsel: (1) promptly to make available to the public "all Appeals and Advice memoranda issued since July 4, 1967, and any documents expressly incorporated therein by reference;" (2) to "produce and compile," with reasonable promptness, "indices of said memoranda"; (3) to "produce explanatory material including existing documents in those instances where Advice or Appeals memoranda rely upon the 'circumstances of the case' or some other vague and imprecise reference * * * except where [the General Counsel] can demonstrate that these documents are exempt under the Act"; and (4) to "cease and desist from deleting from said Appeals and Advice materials the names of parties, the names of attorneys, citations to prior cases and all other information for which a justification for deletion has not been explained fully in writing except settlement suggestions from the Office of the General Counsel and the names of affiants" (Pet. App. C, pp. 9a–10a).

The court of appeals affirmed on the basis of the district court opinion. It also cited its recent opinion in another FOI Act case, *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board*, 482 F. 2d 710, certiorari granted , May 28, 1974, No. 73–1316 (Pet. App. A, p. 2a).[15]

[15] The Court has set *Grumman* for argument in tandem with the present case (A. 214).

SUMMARY OF ARGUMENT

Advice and appeals memoranda are not, as the courts below held, documents required by the FOI Act to be made publicly available and indexed. Rather, they are exempt under Section 552(b)(5), (b)(7), and (b)(2) of the FOI Act. Moreover, underlying documentation from the investigatory files is also exempt under Section 552(b)(7), and it does not lose this status by "incorporation" in memoranda found to be non-exempt.

I.

A. Exemption 5 of the FOI Act excepts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." That is, internal memoranda which would not be routinely disclosed through the discovery process to a private party in agency litigation need not be disclosed.

The legislative history of Exemption 5 indicates that Congress intended thereby to preserve the traditional privilege against disclosure of confidential intra-agency memoranda reflecting deliberations on legal and other policy matters, lest communications between those involved in the policymaking process be unduly constrained. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86–87. Advice and appeals memoranda clearly fall within this class of documents. They reflect the views of the General Counsel

and his staff on unfair labor practice charges, and they are transmitted to Regional Directors as guidance in the issuance of dismissal letters or complaints, and in the prosecution or settlement of cases.

Advice and appeals memoranda are also privileged as attorney's work product (*Hickman* v. *Taylor,* 329 U.S. 495) since they are prepared by attorneys respecting possible agency litigation and reveal the "mental impressions" of the General Counsel and his staff on the issues and evidence in particular cases.

B. Exemption 7 of the FOI Act excepts from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." The legislative history indicates that the language of this exemption as originally proposed was broadened to ensure not only that investigations of violations of criminal and civil regulatory laws would be protected during pre-trial and trial stages, but that continuing protection would be afforded informants, agency investigative techniques, and the privacy of persons mentioned in the files.

Advice and appeals memoranda are related to the enforcement of the labor laws and are part of the regional office investigatory file, which contains all the material which may be used in litigating the case. Nor is it material that not all unfair labor practice charges are ultimately litigated, for Congress did not limit the exemption to files in cases actually prosecuted. See *Weisberg* v. *Department of Justice*, 489 F.

2d 1195 (C.A.D.C.) (*en banc*), certiorari denied, May 13, 1974 No. 73–1138.

C. Exemption 2 of the FOI Act excepts from disclosure matters "related solely to the internal personnel rules and practices of an agency." The House Report indicates that this includes "operating rules" and "guidelines" for "Government investigators or examiners." H. Rep. No. 1497, 89th Cong., 2d Sess., 10. Since advice and appeals memoranda, in giving guidance on particular cases, serve as internal guidelines for personnel in the regional offices, they are covered by this exemption.

II.

The courts below erred in holding that advice memoranda are "instructions to staff" within the meaning of Section 552(a)(2)(C) of the FOI Act, and that appeals memoranda are "final opinions" within the meaning of Section 552(a)(2)(A).

A. Section 552(a)(2)(C) requires an agency to index and "make available for public inspection and copying" all "administrative staff manuals and instructions to staff that affect a member of the public * * *." The legislative history indicates that the term "administrative" was inserted so as to distinguish documents in this category from those which are related to "law enforcement matters" or which concern the "prosecution or settlement of cases." Advice memoranda, which discuss the legal merits of unfair labor practice charges and other prosecutorial considerations, are documents of the type excluded from this section.

B. Section 552(a)(2)(A) requires an agency to index and make publicly available all "final opinions * * * made in the adjudication of cases." In investigating, dismissing, settling, or litigating unfair labor practice charges, the General Counsel and those exercising his delegated powers are acting as prosecutors rather than as adjudicators. Hence, complaints and dismissal letters can hardly be considered "final opinions" within the meaning of this section. *A fortiori,* appeals memoranda which reveal the deliberations leading to the issuance of complaints are not "final opinions * * * made in the adjudication of cases"; they merely trigger the institution of adjudicatory proceedings.

III.

In addition to compelling disclosure of advice and appeals memoranda, the courts below ordered disclosure of any documents expressly referred to in the memoranda, whether or not those documents would be otherwise exempt. The sole authority relied on for this holding, *American Mail Line, Ltd.* v. *Gulick,* 411 F. 2d 696 (C.A.D.C.), has no application to the facts of this case. Moreover, the application of the *Gulick* rule in the present case would tend, in future cases, to deter attorneys in the General Counsel's office from making specific reference to any sensitive documents which they would feel obligated to protect; they would thus be inhibited in giving a full account of facts relevant to important issues.

The portion of the district court order requiring the General Counsel to produce material explaining

references to "the circumstances of the case" and other "vague or imprecise reference[s]," except where he can justify why such material should be withheld, is similarly inappropriate. It might, in many cases, require the General Counsel to go beyond disclosure obligations under the FOI Act and create new explanatory documents not needed in the normal communication process between attorneys in the Washington office and those in the regional offices, who normally have the case file to refer to in connection with the memoranda.

In sum, the application of the *Gulick* incorporation rule in the present case tends to inhibit and unduly formalize intra-agency communication on policy matters, and to breach the confidentiality of investigatory files.

ARGUMENT

The Freedom of Information Act "establish[es] a general philosophy of full agency disclosure * * *." S. Rep. No. 813, 89th Cong., 1st Sess. ("Senate Report") 3. At the same time the Act recognizes that it is "necessary for the very operation of our Government to allow it to keep confidential certain material * * *" (*ibid.*). The Act makes available "to any person" all "identifiable" agency documents, unless they are specifically exempted from disclosure (5 U.S.C. 552). More specifically, the Act divides agency records into three categories: some must be published in the Federal Register (5 U.S.C. 552(a)(1)); others must be published or made publicly available and indexed (Section 552(a)(2)); all other "identifiable records"

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must be made available on request (Section 552(a)(3)). The Act then defines nine categories of documents to which the Act "does not apply" (Section 552(b)).

The district court focused upon the issue whether advice and appeals memoranda are "instructions to staff" and "final opinions" which in terms are subject to disclosure under Section 552(a)(2). The critical inquiry, however, is whether these documents are exempt under Section 552(b), for, if they are, it is immaterial whether they are "instructions to staff" or "final opinions." The Act provides that its disclosure and other provisions do "not apply to matters that are" covered by the exemptions (Section 552(b)). We shall therefore argue first that the memoranda are exempt (Point I) and then show that they are not "instructions to staff" or "final opinions" within Section 552(a)(2) (Point II). Finally we shall argue that documents from investigatory files do not lose their exempt status by incorporation into advice and appeals memoranda (Point III).

I. ADVICE AND APPEALS MEMORANDA ARE EXEMPT UNDER SECTION 552(b) FROM THE DISCLOSURE REQUIREMENTS OF THE FOI ACT

A. ADVICE AND APPEALS MEMORANDA ARE INTRA-AGENCY MEMORANDA EXCEPTED FROM DISCLOSURE UNDER EXEMPTION 5

Exemption 5 of the FOI Act, 5 U.S.C. 552(b)(5), exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption 5 protects any internal

memorandum which would not "*routinely* be disclosed to a private party through the discovery process in litigation with the agency." H. Rep. No. 1497, 89th Cong., 2d Sess. ("House Report") 10 (emphasis added). Thus, advisory memoranda, which are not routinely made available in discovery, are exempt under Exemption 5. As this Court observed in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86, 87, "the legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions * * * are privileged from inspection'" (quoting *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 946 (Reed, J.)).

Exemption 5 thus is based on and incorporates the "public policy * * * of open, frank discussion between subordinate and chief concerning administrative action" (*Kaiser Aluminum & Chemical Corp.* v. *United States, supra*, 157 F. Supp. at 946). The importance of this policy was repeatedly noted during the legislative discussion of Exemption 5. Summarizing the views of government agency witnesses which were taken into account in formulating Exemption 5, the Senate Report states (at 9):

> It was pointed out * * * that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Govern-

ment agencies were prematurely forced to "operate in a fish bowl."

See, also, House Report at 10.

Indeed, in another context, this Court recently recognized this policy.

> "Freedom of communication vital to fulfillment of wholesome relationships is obtained only by removing the specter of compelled disclosure * * * [G]overnment * * * needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 325 (D.C. 1966). [*United States* v. *Nixon,* No. 73–1766, decided July 24, 1974 (slip op., p. 23, n. 17).]

Memoranda reflecting deliberations on prosecutorial policies come within the traditional privilege against disclosure of "confidential intra-agency advisory opinions." *Zacher* v. *United States,* 227 F. 2d 219 (C.A. 8) (letter from United States Attorney to Attorney General recommending that certain criminal action be dropped). See also, *Clark* v. *Pearson,* 238 F. Supp. 495 (D. D.C.). (Justice Department file concerning certain bribery allegations). Cf. *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena, supra* (Justice Department memoranda relating to litigation over the Attorney General's interest in trademark rights seized by him under the Trading With the Enemy Act of 1917, 40 Stat. 411).

As shown above (*supra,* pp. 4–8), advice and appeals memoranda reflect the views of the General Counsel and his staff on whether and how an unfair labor

practice case should be prosecuted. They discuss strengths and weaknesses of the evidence, analyze various legal theories, and suggest litigation strategy. Thus, those memoranda come within the traditional privilege of "confidential intra-agency advisory opinions." Indeed, in the only case prior to the FOI Act considering a claim of privilege for advice memoranda, the court of appeals stated that such "intra-agency correspondence discussing the course of conduct to be followed by the parties and expressing opinions as to the merits of various claims presented to the agency enjoys at least a qualified privilege which, in the absence of special circumstances, shields it from examination by the public." *Davis* v. *Braswell Motor Freight Lines, Inc.,* 363 F. 2d 600, 604–605 (C.A 5).[16] See also *Berkshire Employees Ass'n* v. *National Labor Relations Board,* 121 F. 2d 235, 237–238 (C.A. 3).

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[16] In *Davis*, the Fifth Circuit was considering the validity of a subpoena *duces tecum* directed to Regional Director Davis, which was issued on behalf of Braswell Motor Freight Lines, Inc. (Braswell), the defendant in an action brought by Teamsters Union locals. One of Braswell's defenses referred to a case then pending before the Board, which it alleged would be "dispositive" of one of the issues in its litigation with the locals. The Regional Director, who had prosecuted the case, moved to quash the subpoena on the ground, *inter alia*, that the documents which the subpoena sought—*e.g.*, "memoranda or analysis pertaining to advice, instructions or directions from" the General Counsel—were "privileged." *Id.* at 602. The Fifth Circuit reversed the district court's denial of the motion to quash, holding that Braswell had made no adequate request for the documents before seeking to subpoena them. However, it discussed the privilege issue.

Advice and appeals memoranda are covered by Exemption 5 for a second, independent reason: they constitute the work product of government attorneys in preparation for litigation. See *Hickman* v. *Taylor,* 329 U.S. 495; see also 8 Wigmore, *Evidence* § 2378 (McNaughton Rev. 1961). The General Counsel is a litigating adversary with respect to unfair labor practice charges, and, in deciding whether and in what form to issue a complaint, he must make the same kind of analysis of available evidence that any attorney considering the institution of a law suit would make. "The work products of government attorneys are no less protected than those of private attorneys." *Thill Securities Corp.* v. *New York Stock Exchange,* 57 F.R.D. 133, 138 (E.D. Wis.); see also *United States* v. *Anderson,* 34 F.R.D. 518, 522 (D. Colo.).

As the Fifth Circuit has observed, the Board has a legitimate interest in keeping its "investigatory and prosecutorial functions uninhibited, and, as with the work product of any litigant, there should be some limit on the amount and type of preparatory material that can be subject to mandatory production." *J. H. Rutter Rex Manufacturing Co., Inc.* v. *National Labor Relations Board,* 473 F. 2d 223, 234, certiorari denied, 414 U.S. 822.[17] In advice and appeals memoranda,

[17] In *Rutter Rex*, the respondent in a backpay proceeding sought to subpoena regional office investigatory files, including notes on the case made by regional office investigators. The court rested its ruling that the notes were privileged, at least in part, on the ground that they were "an integral part of the preparation of the Board's lawsuit * * *." 473 F. 2d at 234.

the General Counsel, through his staff attorneys, sets out his "mental impressions" of the issues and evidence in a particular case, as a preliminary step to taking formal action—*i.e.,* issuing a dismissal letter foregoing enforcement action, or issuing a complaint launching the litigation which has been discussed and analyzed in the memoranda.[18] As "work products", these memoranda are "intra-agency memorandums * * * which would not be available by law to a party * * * in litigation with the agency"(5 U.S.C. 552(b)(5)).

The district court (whose opinion the court of appeals adopted) ruled that an appeals memorandum was not exempt under Exemption 5 because (Pet. App. C, p. 8a):

> This is not a preliminary view or a record of advocacy and debate, it is a final determination of the General Counsel's staff of the disposition of a charge. It is not an expression of a point of view, it is the disposition of a charge.

We point out hereafter (Point II) that these memoranda are not the "final opinion," but rather the very first step, "in the adjudication of cases." Moreover, nothing in the traditional privilege for confidential agency documents supports the court's distinction between "upward" memoranda recommending a course of action to a decisionmaker and "downward" memoranda in which a chief advises a subordinate on how to proceed.

[18] The Board has held that such memoranda are irrelevant to its decision. *Truck Drivers Local No. 75 (Associated Transport, Inc.)*, 209 NLRB No. 46, p. 2, n. 1.

The "open, frank discussion between subordinate and chief * * *" (*Kaiser Aluminum Corp., supra,* 157 F. Supp. at 946) which Exception 5 is designed to protect is necessarily a two-way street. The court's restrictive reading limits the exemption in a manner which severely hampers agency operations by impeding the free flow of directions and advice from agency superiors to their subordinates in implementing agency objectives.

Advice and appeals memoranda do not lose the protection of Exemption 5 insofar as they contain factual material, as distinguished from purely advisory comments. While "purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government" (*Environmental Protection Agency* v. *Mink, supra,* 410 U.S. at 88), this Court has recognized that Exemption 5, in its present form,[19] is not to be interpreted

[19] The proposed original text of Exemption 5, excepted from disclosure "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy * * *." The exemption was criticized as too narrow to protect internal memoranda which also contained facts, since intra-agency discussions of law or policy were rarely abstract, but generally included factual material. Decisions to prosecute, for example, could not be discussed without considering the particular case, including availability of proof and reliability of witnesses. See, *e.g.*, Hearing before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1160, *et al.* (Administrative Procedure Act), 89th Cong., 1st Sess. 36, 94–95, 112–113, 205, 236–237, 244, 366–367, 402–403, 417, 437, 490 (hereafter Senate Hearings); and Hearings before the Subcommittee of the House Committee on Government Operations on H.R. 5012, *et al.*, (Federal Public Records Law), 89th Cong., 1st Sess., Part 1, 223–224, 229–230, 256 (hereafter House

in a rigid manner, overlooking the character and function of the documents for which the exemption is claimed (*id.* at 91). Thus, it agreed with the view of the court of appeals in *Mink* that factual material is not properly held severable if it is " 'intertwined with policymaking processes,' " or if it could not be disclosed " ' without impinging on the policymaking decisional processes intended to be protected by this exemption.' " *Id.* at 92.

Applying this test here, we submit that advice and appeals memoranda in their entirety fall under the protection of Exemption 5. While a superficial examination of some of the memoranda in the present record might suggest that there are sometimes "severable" facts which could be disclosed (A. 185–198, 205–212), it is essential to consider the process by which such facts are selected and arranged. The attorneys writing the memoranda are not seeking to give a descriptive account of events they have personally observed. They are not reporting results of scientific research (Cf. *Mink, supra,* and *Soucie* v. *David,* 448 F. 2d 1067 (C.A.D.C.)). Rather, they select from the evidence in the investigatory file those facts considered relevant to the legal issues in the case, and they arrange them accordingly.[20]

Hearings). American Bar Association representative Robert M. Benjamin, testifying in support of broadening the exemption to include factual materials, suggested that language which indicated that discovery would not be altered would broaden the exemption to cover more material. Senate Hearings at 112–113. Exemption 5, as enacted, appears to reflect this advice.

[20] Cf. *Hickman* v. *Taylor, supra,* 329 U.S. at 508–509, concerning summaries of witness interviews.

In *Montrose Chemical Corp. of California* v. *Train*, 491 F. 2d 63, decided six months after the present case, the Court of Appeals for the District of Columbia recognized that factual material may be an integral part of the deliberative processes revealed in the memoranda. In *Montrose*, the plaintiff was seeking, under the FOI Act, summaries of evidence introduced at Environmental Protection Agency hearings on DDT. The summaries were prepared by staff assistants for the EPA Administrator, who was to review the record of the hearing and the decision of the hearing examiner and render a final decision on the question whether DDT registrations should be cancelled. Noting that in previous cases involving Exemption 5 a distinction had been drawn between factual information and deliberative material, the court observed that in the case before it "this factual versus deliberative distinction is inadequate to resolve the difficult question whether the factual summaries should be exempt from disclosure." 491 F. 2d at 67.

To the court, the "heart of the issue" was whether Montrose could "use the FOIA to discover what factual information the Administrator's aides cited, discarded, compared, evaluated, and analyzed to assist the Administrator in formulating his decision" (491 F. 2d at 68). The court concluded that the FOI Act did not authorize that result, stating (*ibid.*):

> The EPA assistants here were exercising their judgment as to what record evidence would be important to the Administrator in making his decision regarding the DDT registrations. Even if they cited portions of the evidence verbatim, the assistants were making an evaluation of the relative significance of the facts recited in the record; separating the pertinent from the impertinent is a judgmental process, sometimes of the highest order; no one can make a selection of evidence without exercising some kind of judgment, unless he is simply making a random selection.
>
> * * * * *
>
> To probe the summaries of record evidence would be the same as probing the decisionmaking process itself. To require disclosure of the summaries would result in publication of the evaluation and analysis of the multitudinous facts made by the Administrator's aides and in turn studied by him in making his decision. Whether he weighed the correct factors, whether his judgmental scales were finely adjusted and delicately operated, disappointed litigants may not probe his deliberative process.

Those considerations are similarly applicable to the present case, and show that the "factual" portions of the advice and appeals memoranda are not discoverable.

In *Montrose* the items sought were summaries of a hearing record which, in their very differences from the record itself, were therefore part of the decisionmaking process. Similarly, here the summaries of evidence, in their organization and selection of materials,

are also part of the decisionmaking process, even though the underlyng investigative material may not yet have been made public.[21]

When a complaint issues, the General Counsel, through the Regional Director, sets forth, with particularity, the incidents which, if proven, will in his judgment establish a violation of the National Labor Relations Act. And, in dismissal letters from Regional Directors (see, *e.g.*, A. 12–13, 21–23) and letters denying appeals from the Office of the General Counsel (see, *e.g.*, A. 199–204), the bases of the decisions are disclosed. To permit claimants to go behind these documents to factual statements in advice and appeals memoranda would give them little more of substance, except for certain confidential information[22] and a structural outline of the processes by which the ultimate decisions were reached.

[21] Whether or not the underlying factual material has previously been made public will depend on whether an unfair labor practice complaint has been issued and whether a hearing has been held. Thus, there may be hearing records relating to some of the older advice and appeals memoranda sought by respondent. Of course, if the FOI Act demand is made by the charging party whose case is the subject of the advice or appeals memorandum before a complaint has been issued (or refused), there will be no record of hearing, but this is merely because these memoranda are compiled before the adjudicative process begins. In contrast, in *Montrose*, the summaries were written as the adjudicative process was ending.

[22] See discussion of Exemption 7, pp. 29–36, *infra*.

For these reasons, advice and appeals memoranda are, in their entirety, covered by Exemption 5, and hence need not be disclosed pursuant to the FOI Act.[23]

B. ADVICE AND APPEALS MEMORANDA AND THEIR UNDERLYING DOCUMENTATION ARE PARTS OF INVESTIGATORY FILES EXEMPTED FROM DISCLOSURE UNDER EXEMPTION 7

Exemption 7 of the FOI Act, 5 U.S.C. 552(b)(7), excepts from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Advice and appeals memoranda and their underlying documentation are also protected by this exemption.

As originally proposed in Senate Bill S. 1666, the exemption for investigatory files exempted such files "until they are used in or affect an action or proceeding or a private party's effective participation therein." S. 1666, as amended, 88th Cong., 2d Sess., 110 Cong. Rec. 17087. This language appeared to exempt files from disclosure only in the early phases of investigation. As the Senate Committee noted, "[t]he exemption covers investigatory files in

[23] Accord: *Seattle Building & Construction Trades Council* v. *Henderson*, 82 LRRM 2362 (W.D. Wash.); *Elsing Manufacturing Co.* v. *National Labor Relations Board*, 82 LRRM 3054 (E.D. Okla.). In both cases, the plaintiffs sought memoranda relating to pending cases, but in *Seattle Building & Construction Trades Council*, the plaintiffs, in addition, unsuccessfully sought an injunction against deletions in memoranda voluntarily made available by the General Counsel.

general, but is limited in time of application." S. Rep. No. 1219, 88th Cong., 2d Sess. 14.

The provision as originally worded was opposed by Senator Humphrey, who called attention to the American Bar Association's opposition to any rule "which would permit a party to engage in a fishing expedition into the [National Labor Relations] Board's investigation files" since "opening of the Board's files to inspection would seriously handicap the Board in the investigation of charges." 110 Cong. Rec. 17667. Senator Humphrey also noted that the long established case law protecting the Board's investigatory files might be compromised by the new bill, observing that the provision was "susceptible to the interpretation that once a complaint of unfair labor practice is filed by the General Counsel of the National Labor Relations Board, access could be had to the statements of all witnesses, whether or not those statements are relied upon to support the complaint." *Ibid.* See also, Senate Hearings at 490–491. In consequence Senator Long, chairman of the subcommittee which had held the hearings on S. 1666, offered as a substitute the language eventualy enacted into the law. 111 Cong. Rec. 17668.

The House Report on the investigatory files exemption, as enacted, states:

> This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings. [House Report at 11.]

The purposes of the exemption are reflected in the Senate Report, which notes that disclosure of such files "could harm the Government's case in court" (Senate Report at 9) and states that "[i]t is * * * necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation" (*Id.* 3). Summarizing these reports, the Court of Appeals for the Second Circuit, in *Frankel* v. *Securities and Exchange Commission,* 460 F. 2d 813, 817, certiorari denied, 409 U.S. 889, said:

> These Reports indicate that Congress had a two-fold purpose in enacting the exemption for investigatory files: to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information. Both these forms of confidentiality are necessary for effective law enforcement.

The documentation underlying advice and appeals memoranda are "investigatory files related to enforcement of * * * labor * * * laws" (House Report at

11).[24] In light of the language and purposes of the exemption, we believe the advice and appeals memoranda themselves are part of the "investigatory files compiled for law enforcement purposes * * *" (5 U.S.C. 552(b)(7)). As indicated, these memoranda usually include a selective summary of investigative results and are placed in the regional office investigatory file which contains all the material to be used in litigating the case.

Moreover, since its decision in the present case, the Court below has recognized that, once a court has satisfied itself that documents sought are "investigatory files compiled for law enforcement purposes," its "duty in achieving the will of Congress under the Freedom of Information Act [is] at an end." *Weisberg* v. *Department of Justice,* 489 F. 2d 1195, 1202–1203 (C.A.D.C.) (*en banc*), certiorari denied, May 13, 1974, No. 73–1138. (Accord: *Center for National Policy Review* v. *Weinberger,* C.A.D.C. No. 73–1090, decided May 21, 1974, pending on petition for rehearing; *Rural Housing Alliance* v. *Department of Agriculture,* C.A.D.C., No. 73–1771, decided June 3, 1974; *Ditlow* v. *Brinegar,* 494 F. 2d 1073, 1074 (C.A.D.C.), petition for a writ of certiorari pending, No. 73–1780; *Aspin* v. *Department of Defense,* 491 F. 2d 24, 30 (C.A.D.C.).

[24] Indeed, the district court conceded that they were "possibly qualified for a Sec. (b) exemption taken separately," but held that they had "lost their exempt status by incorporation" (Pet. App. C, p. 8a). *Infra* in Point III, we discuss the district court's application of the doctrine of incorporation by reference.

Similarly, as explained in *Ditlow,* an agency need not prove, as to the contents of each requested file, that disclosure would "harm the Government's case in court"; for "it is not in the province of the courts to second-guess the Congress by relying upon considerations which argue that the Government will not actually be injured by revelation in the particular case." 494 F. 2d at 1074. Accordingly, it is immaterial in applying Exemption 7 whether a complaint issues on unfair labor practice charges or the charges are dismissed. See *Center for National Policy Review* v. *Weinberger, supra; Cowles Communications, Inc.* v. *Department of Justice,* 325 F. Supp. 726 (N.D. Cal.). Similarly, it is immaterial whether the case is closed or still pending.[25]

Advice and appeals memoranda do not come within the "except" clause of Exemption 7—which excepts material which would be "available by law to a party other than an agency." The legislative history of Exemption 7 shows that this exception was designed solely to insure that private litigating parties to whom material in an investigatory file is otherwise available by law do not lose that right by virtue of Exemption 7, *e.g.,* an individual who is entitled under the Jencks Act to see an FBI report. 110 Cong. Rec. 17667–17668. However, Exemption 7 "is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." House

[25] Amendments to Exemption 7 are under consideration in S. 2543, a proposed bill to amend the FOI Act (120 Cong. Rec. S9329–S9337 (daily ed., May 30, 1974)).

Report at 11. See *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591, 593–594 (D. P.R.). See also *Clement Brothers Co.* v. *National Labor Relations Board*, 282 F. Supp. 540, 542 (N.D. Ga.); *Benson* v. *United States*, 309 F. Supp. 1144 (D. Neb.).

The exception to Exemption 7 thus serves a purpose quite different from the exception to Exemption 5, which operates to make available to the general public those internal memoranda which would be routinely available to litigants. See, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (*Attorney General's Memorandum*), p. 38 (June 1967). But even if viewed as performing the same role, the exception to Exemption 5 would not avail the respondent.

As already noted (*supra*, p. 21), advice memoranda are not routinely available to parties to a Board proceeding (*Davis* v. *Braswell*, *supra*); nor is there any law suggesting that appeals memoranda would be. Indeed, discovery in unfair labor practice or related backpay proceedings is highly limited. *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854 (C.A. 2), certiorari denied, 402 U.S. 915.[26]

[26] Under the Board's "Jencks Act" rule a witness' pre-trial statements are made available after the witness has been called to testify in a Board proceeding. Rules and Regulations, Section 102.118(b), 29 C.F.R. 102.118(b). Discovery of such statements to a greater extent had generally been denied prior to the FOI Act. See, *e.g.*, *National Labor Relations Board* v. *Vapor Blast Manufacturing Co.*, 287 F. 2d 402, 405–408 (C.A. 7), certiorari denied, 368 U.S. 823; *National Labor Relations Board* v. *Chambers Manufacturing Corp.*, 278 F. 2d 715, 716 (C.A. 5); *Raser Tanning Co.* v. *National Labor Relations Board*, 276 F. 2d 80, 82–83 (C.A. 6), certiorari denied, 363 U.S. 830. Accordingly, the lower courts have denied requests for such statements under the FOI Act as well. *Clement Brothers Co., Inc.* v. *National Labor Relations Board*, *supra*, approved in *National Labor Relations Board* v. *Clement Brothers Co., Inc.*, 407 F. 2d 1027, 1030–1031 (C.A. 5); *Barceloneta Shoe Corp.* v. *Compton*, *supra*. See also *Wellman Industries, Inc.* v. *National Labor Relations Board*, 490 F. 2d 427 (C.A. 4), petition for a writ of certiorari pending, No. 73–1785.

Cf. *National Labor Relations Board* v. *Rex Disposables*, 494 F. 2d 588(C.A. 5).[27] Moreover, the courts have recognized that "fishing expedition[s]" into Board files are not permissible, since, "[a]s with other prosecutorial and regulatory agencies, in order for the N.L.R.B. to fulfill its statutory duties, it must be accorded some semblance of evidentiary privilege to

[27] In the special circumstances of a particular contempt proceeding, the Seventh Circuit held that the Special Master could compel production of certain case files for *in camera* inspection, to determine if they contained evidence relevant to the issues in the proceeding. However, the court recognized that the "integrity" of such files was to be respected as far as possible, and it expressly limited its holding "to contempt proceedings of the character now before us." *Olson Rug Co.* v. *National Labor Relations Board*, 291 F. 2d 655, 662 (C.A. 7).

protect its informal investigational and trial-preparatory processes." *J. H. Rutter Rex Manufacturing Co., Inc.* v. *National Labor Relations Board, supra,* 473 F. 2d at 231.

In its brief in the courts below, Sears emphasized the usefulness to parties of gaining access to advice and appeals memoranda, amplified by other "explanatory" documentation from the investigatory files. Doubtless many such documents would be of use to parties to Board proceedings. They would no doubt benefit also from gaining access to witnesses' affidavits or the trial attorney's notes. As this Court has observed, however, "Discovery for litigation purposes is not an expressly indicated purpose" of the FOI Act. *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.,* 415 U.S. 1, 24. By Exemption 7, Congress sought to insure that the FOI Act would not be used to expand discovery to reach an agency's investigatory files and thereby hobble an agency's enforcement of the law.

C. ADVICE AND APPEALS MEMORANDA ARE "INTERNAL PERSONNEL RULES AND PRACTICES" EXCEPTED FROM DISCLOSURE UNDER EXEMPTION 2

In addition to citing Exemptions 5 and 7, the General Counsel denied respondent's request for advice and appeals memoranda because they were "guides for a Regional Director as to how a specific case is to be handled" (A. 19). While the General Counsel did not cite Exemption 2, 5 U.S.C. 522(b)(2), our review of the case indicates that "guides * * * as to how a specific case is to be handled" are documents

"related solely to the internal personnel rules and practices of an agency," exempt from disclosure under Exemption 2.

In explaining Exemption 2, the Senate Report states (at 8):

> Exemption No. 2 relates only to internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

The examples cited by the Senate Report are illustrative and not exclusive. Thus the House Report explains the exemption in the following terms (at 10):

> Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under present law.[14]

In footnote 14, the House Report referred to its hearings on the Act, where Congressman Moss—one of the leading architects of the FOI Act—stated with reference to Exemption 2:

> What this was intended to cover was instances such as the manuals of procedure that are handed to an examiner—a bank examiner, or a savings and loan examiner, or the guidelines given to an FBI agent. [House Hearings at 29.]

Subsequently, during the debates on the Act in the House, Congressman Gallagher explained further (112 Cong. Rec. 13659):

> I would like to reiterate that the bill also prevents the disclosure of other types of "sensitive" Government information such as FBI files, income tax auditors' manual, records of labor-management mediation negotiations and information a private citizen voluntarily supplies.
>
> The FBI would be protected under exemption No. 7 prohibiting disclosures of "investigatory files." Income tax auditors' manual would be protected under No. 2—"related solely to internal personnel rules and practices." * * *

Finally, when President Johnson signed the Act into law he noted that government officials "cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions." 2 *Weekly Compilation of Presidential Documents* 895 (July 11, 1966).

The leading administrative interpretation of Exemption 2 is contained in the *Attorney General's Memorandum* and it adopts the view reflected in this legislative history, that is, that the words "personnel rules and practices" in the exemption "are meant to relate to those matters which are for the guidance of agency personnel only, including internal rules and practices which cannot be disclosed to the public without substantial prejudice to the effective performance of a significant agency function" (*id.* at 30). As an example of guidance which would be exempt, the *Attorney General's Memorandum* observed (p. 31):

> An agency cannot bargain effectively for the the acquisition of lands or services or the disposition of surplus facilities if its instructions to its negotiators and its offers to prospective sellers or buyers are not kept confidential.

This legislative history and administrative interpretation indicate that the General Counsel's "guides for a Regional Director as to how a specific case should be handled" are matters relating to "internal personnel rules and practices" within Exemption 2. While some lower courts have held that the examples set forth in the Senate Report reflect a congressional intent that only documents concerning an agency's relations with its employees are within Exemption 2,[28] we believe, for several reasons, that that view is unreasonable. In the first place, we can see no reason why Congress would have protected from disclosure such mundane matters as employee parking rules—whose confidentiality cannot be deemed necessary for effective functioning of government—while at the same time permitting disclosure of the kind of material

[28] *Stokes* v. *Brennan*, 476 F. 2d 699 (C.A. 5), *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787 (C.A. 6), and *Stern* v. *Richardson*, 367 F. Supp. 1316 (D. D.C.).

whose publication would jeopardize the precise governmental interests Congress intended to protect by the exemptions. Moreover, there is a vital and widespread government need in conducting adversary functions—law enforcement, contract administration, negotiations, etc.—to protect instructions and guidance to operating personnel where disclosure would undermine the function, and such communications generally fit logically under the concept and purposes of Exemption 2, as the House Report recognized.

In our view the better reasoned cases have recognized the important role of Exemption 2 in protecting the confidentiality of instructions to operating personnel. Thus in *Polymers, Inc.* v. *National Labor Relations Board,* 414 F. 2d 999, 1006 (C.A. 2), certiorari denied, 396 U.S. 1010, an agency manual, entitled "A Guide to the Conduct of Elections," was held exempt under Exemption 2.[29] See also *Cuneo* v. *Laird,* 338 F. Supp. 504 (D. D.C.), remanded on other grounds, 484 F. 2d 1086 (C.A.D.C.); *Pifer* v. *Laird,* 328 F. Supp. 649, 652 (N.D. Cal.).

There is, of course, a difference between a guide couched in generalized terms, discussing the handling of various classes of potential cases, and a guide "as to how a specific case is to be handled," but that is not a difference that puts advice and appeals memoranda without the scope and purpose of Exemption

[29] But see *Rose* v. *Department of the Air Force,* 495 F. 2d 261 (C.A. 2). The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Rose.*

2. The example in the *Attorney General's Memorandum* (*supra,* p. 39) of an agency bargaining "for the acquisition of lands or services or the disposition of surplus facilities" is instructive. To be sure an agency might formulate general guidelines for all its negotiations, however, it would be more likely to give guidance on a case-by-case basis. Surely the disclosure of the latter, as much as the former, would "substantial[ly] prejudice * * * the effective performance of a significant agency function" (*Attorney General's Memorandum,* p. 30).

So here, the General Counsel's advice and appeals memoranda instruct Regional Directors in the conduct of contemplated litigation. The confidentiality of such specific guidance is as important to the effective conduct of the agency's function as is the confidentiality of any general instruction in the handling of cases. Accordingly, advice and appeals memoranda are exempt under Exemption 2.

II. ADVICE AND APPEALS MEMORANDA ARE NOT "INSTRUCTIONS TO STAFF" OR "FINAL OPINIONS * * * MADE IN THE ADJUDICATION OF CASES" WITHIN SECTION 552 (a)(2) OF THE FOI ACT.

In holding that advice memoranda are "instructions to staff that affect a member of the public" within the meaning of Section 552(a)(2)(C) of the FOI Act and that appeals memoranda are "final opinions" within the meaning of Section 552(a)(2)(A) (Pet. App. C, pp. 7a, 9a), the courts below

misconstrued those provisions and misjudged the function of these memoranda.[30]

A. ADVICE MEMORANDA ARE NOT "ADMINISTRATIVE STAFF MANUALS AND INSTRUCTIONS"

Section 552(a)(2)(C) requires that agencies index and make available for public inspection "administrative staff manuals and instructions to staff that affect a member of the public." The court below ignored the modifying word "administrative" in holding that advice memoranda were "instructions to staff" within that provision.

As originally drafted, S. 1160, 89th Cong., 1st Sess., which was ultimately enacted as the FOI Act, would have required agencies to "make available for public inspection and copying" all "staff manuals and instructions to staff that affect any member of the public, unless such materials are promptly published and copies offered for sale." 111 Cong. Rec. 2797. This provision was amended by the insertion of the word "administrative" before "staff manuals and instructions," an amendment which the Senate Report explained as follows:

> The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action. [Senate Report at 2.]

In a similar vein, the House Report noted that, under the amended language, "an agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff * * * in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution or settlement of cases." House Report at 7–8.

In applying Section 552(a)(2)(C) to advice memoranda, the courts below ignored the fact that this Section applies only to "administrative" memoranda. As shown in the Statement (supra, pp. 4–6), advice memoranda "pertain to law enforcement matters" rather than to "administrative matters," and they necessarily concern the "prosecution or settlement" of cases. Nothing in the legislative history of Section 552(a)(2)(C) suggests that analyses by attorneys regarding the advisability of prosecuting a particular case are to be indexed and made available to the public.

Indeed, the court which has construed this provision most broadly would protect the confidentiality of information the disclosure of which would significantly impede the enforcement process, and would re-

[30] Although the amended complaint alleged that the materials sought also came within Section 552(a)(2)(B), which encompasses "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register," the courts below correctly placed no reliance on this provision. As noted (*supra*, pp. 6, 8), advice and appeals memoranda have no precedential value and hence are not "adopted by the agency."

quire disclosure only of other material which might "eventually affect the law enforcement process." *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 795 (C.A. 6). Advice memoranda, which analyze the evidence uncovered in the investigation of a particular case and which authorize the Regional Director to issue a complaint or to dismiss charges, would not be disclosable under this stringent test; they are not guidelines or rules which may "eventually" affect the law enforcement process, but are an integral part of that process.

Since, as shown, Congress excluded "law enforcement matters" from the ambit of Section 552(a)(2)(C), the courts below erred in concluding that advice memoranda fall within that provision, and its indexing requirement.[31]

B. APPEALS MEMORANDA ARE NOT "FINAL OPINIONS * * * MADE IN THE ADJUDICATION OF CASES"

Section 552(a)(2)(A) requires that agencies index and make available for public inspection and copying "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." The courts below ignored the modifying phrase "made in the adjudication of cases" in holding that appeals memoranda were "final opinions" within the meaning of that provision.

As explained in the Statement (*supra*, pp. 6–8), the appeals memoranda sought in this case are produced in connection with the General Counsel's exercise of his prosecutorial discretion under the Labor Management Relations Act. Since this discretion is as broad as that of attorneys general or United States Attorneys (see p. 3, *supra*), the General Counsel is not required to give an explanation for a decision either to go forward or not to go forward with a given case. See *Weisberg* v. *Department of Justice*, *supra*, 489 F. 2d at 1201–1202; *Newman* v. *United States*, 382 F. 2d 479 (C.A.D.C.); *Division 1267, Amalgamated Association of Motor Coach Employees* v. *Ordman*, 320 F. 2d 729, 730 (C.A.D.C.).[32]

The appeals memorandum, which the General Counsel sends to a Regional Director when the General Counsel sustains an appeal from the Regional Director's refusal to issue a complaint, is not a final opinion "made in the adjudication" of a case, because the General Counsel is not an "adjudicat[or] of cases".[33] The memorandum merely triggers further

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[31] The indexing requirement is applicable only to the materials enumerated in Section 552(a)(2) of the FOI Act (see, *infra*, p. 54). However, specifically identified advice or appeals memoranda would still have to be made available on request under Section 552(a)(3) (concerning "identifiable records") if they did not qualify for an exemption under Section 552(b). As shown (*supra*, pp. 18–41), advice and appeals memoranda to qualify for exemption.

[32] When he does go forward, the General Counsel is, of course, obligated to supply the party charged with a complaint particularizing the charges against him.

[33] The broad language of the Administrative Procedure Act's (APA) definitional section must be read in context. 5 U.S.C. 551(7) defines "adjudication" as "agency process for the formulation of an order." "Order" is defined as "the whole or part of a final disposition * * * of an agency in a matter" (5 U.S.C. 551(6)). An appeal memorandum is not the "final disposition" by the agency of the unfair labor practice complaint, since, in sustaining the appeal, the General Counsel has directed that a complaint be filed and the adjudicatory process begun.

proceedings in the case. It is part of the case file which the attorney in the regional office may refer to for guidance as he proceeds to the hearing before the Administrative Law Judge, who, on behalf of the Board and subject to its plenary review, will issue the "final opinion" made in the adjudication of the case.[34]

III. DOCUMENTS FROM INVESTIGATORY FILES DO NOT LOSE THEIR EXEMPT STATUS BY INCORPORATION INTO ADVICE AND APPEALS MEMORANDA

The courts below not only compelled disclosure of advice and appeals memoranda, but also opened the door to broad-scale incursions into other portions of the General Counsel's investigatory files.[35] Even if this

[34] When the General Counsel acts on an appeal from the Regional Director's refusal to issue a complaint, he sends the parties a letter briefly stating reasons for his action. These letters are not "final opinions * * * made in the adjudication of cases" because, as noted in the text, the General Counsel is not an adjudicator.

Because he is aware of the importance to the public of the way in which he carries out his responsibilities, the General Counsel also issues quarterly reports on significant cases and enforcement patterns. As General Counsel Nash has stated, "Such a policy, in my judgment, produces a better informed labor bar and public and affords me the opportunity to receive comments on my action * * *." (A. 150).

[35] The district court order requires the General Counsel to produce "any document expressly incorporated" in advice or appeals memoranda "by reference," and to "produce explanatory material including existing documents in those instances where [such] memoranda rely upon the 'circumstances of the case' or some other vague and imprecise reference without delineating what those circumstances are except where [he] can demonstrate that these documents are exempt under the Act" (Pet. App. C, pp. 9a–10a).

Court were to hold, contrary to our principal submission, that advice and appeals memoranda are not exempt under the FOI Act, we submit that that Act does not require the General Counsel to disclose other sensitive contents of his investigatory files simply because they happen to be referred to in such memoranda.

The courts below acknowledged that the documents referred to "possibly qualified for a Sec. (b) exemption taken separately" (Pet. App. C, p. 8a). Nevertheless the courts ruled that they must be disclosed where "incorporated by reference in Advice and Appeals memoranda" (*ibid.*). Nothing in the terms or legislative history of the FOI Act supports this result. Indeed, the courts below supported their holding solely by reference to a single case (Pet. App. C, p. 8a), *American Mail Line, Ltd.* v. *Gulick*, 411 F. 2d 696 (C.A.D.C.). That case, however, does not support the court's conclusion. *Gulick* concerned a decision by the Maritime Subsidy Board of the Department of Commerce that certain steamship operators were not entitled to the full amount of government subsidies which had previously been paid them. In reaching this decision, the Subsidy Board had to determine the maximum size of the crew necessary for efficient and economical operation of various kinds of vessels. The Subsidy Board publicly stated in its decision that its ruling on this question was based upon a " 'memorandum dated November 26, 1965, revised December 20, 1967.' " 411 F. 2d at 698. It set forth as its own

finding and determination the last five pages of the memorandum, but declined to reveal the remainder.[36] The court of appeals held that the rest of the memorandum had to be disclosed under the FOI Act, explaining:

> If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny, it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action. When it chose this course of action "as a matter of convenience" (Brief for Appellee at 9) the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants. [*Id.* at 703.]

The Court of Appeals for the District of Columbia has narrowly limited the rule of that case .In *Bristol-Myers Co.* v. *Federal Trade Commission,* 424 F. 2d 935, 939, the court cited *Gulick* for the proposition that "an internal *memorandum* may lose its protected status when it is *publicly cited* by an agency as the *sole basis* for agency action" (emphasis supplied). Accord: *Montrose Chemical Corp. of California* v. *Train, supra,* 491 F. 2d at 70; *Sterling Drug, Inc.* v. *Federal Trade Commission,* 450 F. 2d 698, 705–706 (C.A.D.C.).[37]

[36] Its decision was implemented a week later by an order directing the steamship operators to refund over three million dollars in past subsidy payments. 411 F. 2d at 698.

[37] Similarly, the Court of Appeals for the Second Circuit, emphasizing the unique facts in *Gulick*, held that the case stood only for the proposition that a memorandum must be disclosed when it is "incorporated into the final order and administrative decision of [an] agency" and is "specifically referred to as the sole basis for its decision." *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1359, certiorari denied, 404 U.S. 827. Thus, it refused to order disclosure under the FOI Act of memoranda by Commission staff members which the plaintiff insisted were essential to understanding the basis for the Commission's disclaimers of jurisdiction in four prior cases.

The *Gulick* rule has no application to this case. Unlike the decision of the Maritime Subsidy Board, the advice and appeals memoranda, into which the district court found documents are incorporated, are not final adjudications of the agency. The memoranda are not intended as public records of decisions, nor is anything "publicly cited" in them. Moreover, what is cited is not given as the "sole basis" for agency action. Indeed, the documents "incorporated" in the memoranda are, for the most part, not themselves memoranda, but merely the statements of witnesses and other material obtained in the course of investigating the unfair labor practice charge.

The district court opinion makes a curious distinction. It provides that "documents incorporated by reference" in advice and appeals memoranda must be disclosed even though possibly exempt "taken separately" (Pet. App. C, p. 8a), but that documents underlying references in the memoranda to the " 'circumstances of the case' " need not be produced if "the General Counsel demonstrates such documents to be exempt" (Pet. App. C, p. 9a). The practical result of

applying this rule would be to inhibit the agency deliberative processes which Exemption 5 was designed to safeguard. For, to protect the confidential contents of investigatory files, attorneys writing advice and appeals memoranda would be induced to make vague reference to the "circumstances of the case," rather than specific references to sensitive documents, lest they strip them of their privilege by "incorporation."

There is no warrant for the district court's requirement that, where advice and appeals memoranda refer to "the circumstances of this case" or make other "vague or imprecise reference[s]," the General Counsel must either produce the underlying documentation or justify his failure to do so. Respondents' contention (C.A. Br. 18) that such general references "circumvent the public's right to know" the "rationale" of the memoranda is a bootstrap argument, for there was never any intention in the Act to allow public access to the memoranda themselves, let alone any matter referred to in them. Advice and appeals memoranda are not written for public consumption, to be issued as if they were full-fledged agency opinions. Rather, they are written for the benefit of those in the regional office who will use them, together with other contents of the investigatory files, for guidance in dismissing, settling, initiating, or prosecuting cases. The references to the "circumstances of the case" are

simply efficient, shorthand means of communicating with a Regional Director who already knows these circumstances fully, having previously reviewed the case.[25]

Indeed, the district court, through its requirement that the General Counsel "produce explanatory material," has gone beyond the requirements of the FOI Act, which obligate an agency only to *disclose* nonexempt, identifiable records. For, whenever such explanatory material exists only in confidential documents which the General Counsel is obligated to protect, he will be compelled to attempt to *create* a new document which will explain factual details without compromising confidential information.

In sum, the application of the *Gulick* incorporation rule in the present case tends to inhibit and unduly formalize intra-agency communication on policy matters, and to breach the confidentiality of investigatory files.

---

[25] Streamlined procedures are essential in view of the heavy caseload handled by the Division of Advice and the Office of Appeals. In the year ending June 30, 1973, 1,287 cases were sent to Advice, representing 5 per cent of the cases disposed of by the regional offices. The corresponding figures for the preceding year were 1,444 cases, representing 5.8 per cent of total dispositions. The Office of Appeals handled 2,416 cases in the year ending June 30, 1973, and 2,470 during the previous year, representing 27.1 and 29 per cent, respectively, of total cases in which the Regional Directors refused to issue complaints. National Labor Relations Board Budget Document (Sept., 1973).

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

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AUGUST 1974.

APPENDIX

The provisions of the Freedom of Information Act 5 U.S.C. 552) are as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedures, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person

may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance, with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1233

NATIONAL LABOR RELATIONS BOARD and PETER G. NASH, GENERAL COUNSEL,

Petitioners,

vs.

SEARS, ROEBUCK AND CO.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT SEARS, ROEBUCK AND CO.

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BRIEF ON BEHALF OF RESPONDENT SEARS, ROEBUCK AND CO.

QUESTIONS PRESENTED FOR REVIEW

Petitioner General Counsel—the only government agency here involved notwithstanding the Petitioner's references to the "National Labor Relations Board" and the "Agency"—has now raised issues which have not heretofore been involved in the instant controversy. The instant case does not deal with merely the "branch of [an] agency" (Pet. br., p. 2) but with an *independent* agency—the General Counsel. The General Counsel's status as an agency is *not* at issue.[1] Accordingly, Sears is compelled to restate the primary question at issue in this case:

1. Before the District Court, the General Counsel conceded, indeed alleged (A. 39) and argued (Points and Authorities of Defendant in Opposition and in Support of Its Cross-Motion for Summary Judgment, filed with the District Court on June 21, 1972, p. 8, n. 3), that he and his office constituted an independent Freedom of Information Act agency, and the District Court so found. Pet. App. C, p. 6a, n. 4. This fact must be emphasized in light of the Petitioner's repeated use of the amorphous term "agency" which does not distinguish between the Board and the General Counsel.

> Whether, based on the evidentiary record presented to the District Court, that Court erred by finding that the General Counsel, as an independent agency under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* (hereafter "the Act"), failed to sustain his burden of proof and demonstrate that certain of his records constituted exempt intra-agency memoranda rather than final opinions, or "mandatory . . . instructions to staff that affect a member of the public" (Pet. App. C, p. 7a), which must be indexed and disclosed under the Act.

In short, Sears' contention is that the memoranda at issue are the law of the agency, and that such statements of law are not intra-agency memoranda within the meaning of Exemption 5 of the Information Act (5 U.S.C. 522(b)(5)). The General Counsel has now expanded that question by contending that the memoranda at issue, even if they are the law of the agency rather than pre-decisional, consultative documents, are still exempt under Exemption 5; are part of an investigatory file protected by Exemption 7 (5 U.S.C. 522(b)(7)); and are "related solely" to internal personnel matters protected by Exemption 2. 5 U.S.C. 552(b)(2).[2] Accordingly, assuming *arguendo* the propriety of litigating new issues before this Court, the matters in dispute have now become:

> Whether memoranda (1) which embody an agency's final statement of the law; (2) which are centrally indexed by subject-matter, i.e. legal issue, and are "used" by the agency in future cases on a nationwide basis to maintain uniformity in the agency's application of law; and (3) which admittedly contain no actical litigation information, or other sensitive material,[3] can be classified under the Information Act as exempt intra-agency memoranda within the meaning of Exemption 5, can be considered part of an investigatory file within the meaning of Exemption 7, or can be considered "solely related" to internal personnel matters within the meaning of Exemption 2.

2. Previously, in its brief submitted to the District Court (see Points and Authorities of Defendant in Opposition and in Support of Its Cross-Motion for Summary Judgment filed June 21, 1972) and the Court of Appeals (see Appellant's principal and reply briefs), the General Counsel only argued that Exemption 7 precluded the disclosure of documents that had been incorporated by reference in the primary memoranda here at issue—not the disclosure of the memoranda themselves. In addition, with regard to Exemption 5, he argued only that the memoranda at issue were "pre-decisional" guides that did not constitute the law of the agency. Exemption 2 has never been involved in this litigation in any manner before.

COUNTERSTATEMENT OF THE CASE

The General Counsel possesses the sole power under the National Labor Relations Act (29 U.S.C. § 151, *et seq.*) to consider a private party's "charge" that his rights have been violated and institute proceedings before the National Labor Relations Board; as a result, the General Counsel completely controls an aggrieved party's access to the remedial processes of the Board. 29 U.S.C. § 153(d).[4] Such direct and absolute control over private remedial rights—rather than simply public rights—is rare, if not unique, among administrative agencies.

As an independent agency vested with unreviewable authority, the General Counsel's decision as to whether to institute proceedings significantly determines the course of national labor policy. By determining, for example, to dismiss a charge, the General Counsel can preclude Board review and thereby dictate the development of the law. Recognizing this principle, Sears commenced the instant action, on behalf of itself and other similarly situated charging parties,[5] to obtain access under the

3. In its reply brief to the Court of Appeals (p. 4), the General Counsel conceded that none of the representative samples (see A. 46 and A. 51) submitted to the District Court contained such material. This procedure was in conformity with this Court's guidelines in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73.

4. Once proceedings commence, the charging party is a party to the litigation. See *International Union, etc., Local 283* v. *Scofield*, 382 U.S. 205.

5. This suit was brought as a class action under Rule 23, F.R.C.P., by Sears on behalf of itself and other charging parties under the Labor Act. The District Court, however, concluded that it

Information Act to essentially two types of documents, which, Sears alleged, were "opinions", unpublished "statements of policy and interpretations", and "instructions" that determined if, and when, a private remedy would be available under the Labor Act. The first documents, referred to as Advice memoranda, were found by the District Court to contain the substantive agency law on "new questions arising in the field of labor relations" (Pet. App. C, p. 6a) which can, absent an appeal from an adverse determination, terminate action by the General Counsel, N.L.R.B. Statements of Procedure, §§ 101.6, 101.8. The other documents, referred to as Appeals memoranda, were found to be final opinions which also could conclude, as well as determine, the final action to be taken by the General Counsel as an independent agency. The procedures of the General Counsel described hereafter provided the basis for these conclusions and findings.

A. The Advice Memoranda

An aggrieved person seeking relief from an unfair labor practice initiates agency action by filing a charge with one of thirty-six Regional Directors. N.L.R.B. Statements of Procedure, § 101.2. These Regional Directors act under the "supervision of the Office of the General Counsel" (N.L.R.B. Statement of Organization and Function, § 203.1) which has delegated to each Regional Director the authority in routine cases, after investigating the charge, to decide whether to issue an unfair labor practice complaint, thereby commencing proceedings before the Board. However, where the case involves one of several novel or complex legal issues periodically designated by the General Counsel (see, e.g., A. 151), "the regional director . . . *must* submit the case for advice from the general counsel". N.L.R.B. Statements of Procedure, § 101.8 (emphasis added). This procedure is necessary because the designated issues require a "uniform policy determination" for the "sound and fair administration of the [Labor] Act". Operations, p. 2A.[6] In such "Advice" cases, the Regional Director submits a statement of the facts and issues to a separate division of the Office of the General Counsel, the Advice Branch in Washington, "along with the regional director's recommendations". Pet. App. C, p. 6a. The Advice Branch does not deal with factual questions nor does it interfere with the investigation, "but rather, concerns itself with the interpretation and application of legal principles". Operations, p. 3A. The Associate General Counsel, who is delegated the responsibility for the Advice Branch, supervises the review of such "requests for advice and *formulates policy* on novel or unsettled procedural and *substantive matters* arising in unfair labor practice cases". Points and Authorities of Defendant in Opposition and In Support of Its Cross-Motion for Summary Judgment in the District Court, quoting from the N.L.R.B.'s Statement of Organization and Function, § 202.1.1 at A. 146 (emphasis added).[7] Such policy formulation by the Advice Branch assures that all important cases reach and are resolved by Washington; it is only after such "definitive policy determinations are reached in Washington" and unsettled matters clarified for the regional offices that a particular issue may no longer be required to be submitted for Advice and authority "*redelegated* to the Regional Directors." Operations, p. 2A (emphasis added).

The process by which the Advice Branch "formulates" substantive policy" is well-established and revolves around the use of

need not address the class question "[s]ince whatever relief this Court chooses to grant the plaintiff will necessarily be binding on the defendants as to all persons." Pet. App. C, p. 4a, n. 1.

6. This quotation is from the "Operations of the Office of the General Counsel" (hereafter "Operations") described more fully *infra* at p. 10, n. 13, and appended to this brief for the Court's convenience.

7. The language of the delegation of authority to the Associate General Counsel in charge of the Advice Branch was amended on July 25, 1972—one month after Sears brought this delegation to the attention of the District Court in its Opposition to Defendant's Cross-Motion for Summary Judgment (p. 2, n. 1) filed on July 26, 1972. Since the General Counsel has failed to note any substantive change in the agency's operation either in its brief or in the courts below, it is presumed that the Associate General Counsel still possesses the authority above-described.

"agendas". This process, as described in great detail by the General Counsel to the House Subcommittee on the National Labor Relations Board in the appended statement designed as Operations, begins with a thorough study, by the staff attorney assigned to the case, of the *"recommendations* formulated by the regional director." Operations, p. 4A (emphasis added). The staff attorney then "researches all cases in point and *ascertains the applicability of prior advice determinations in similar or related cases*". Operations, p. 4A (emphasis added). This research is accomplished by utilizing an internal subject-matter index of prior Advice decisions first made public during the instant litigation. After consulting with his supervising attorney, the staff attorney makes a written and oral presentation, which notes any disagreement between the staff and supervising attorney, to an "agenda" of the ranking members of the General Counsel's staff. Oral argument by the parties is also granted in important cases. At the conclusion of this system of mutual consultation, "the Agenda decision is submitted to the General Counsel, . . . together with any dissenting opinions. . . . The General Counsel's *final determination* is [then] communicated to the Regional Office by way of an [Advice] memorandum for implementation".[8] Operations, p. 4A (emphasis added). This Advice memorandum, the document here at issue, "[i]n order to avoid any misunderstanding between the Regional Office and the Advice Branch, . . . ordinarily recites the facts upon which the Advice Branch relied in

8. The General Counsel has conceded that only "rarely, if ever," does a Regional Director disregard an Advice decision. Pet. br., p. 6. Indeed, no evidence of even a single instance in which a Regional Director did not adhere to an Advice Branch decision was presented to the District Court by the General Counsel nor discovered by Sears in its extensive examination of Advice decisions and, at oral argument in the Court of Appeals, counsel for the General Counsel conceded that he knew of no instance where a Regional Director had refused to implement an Advice decision. The record does not disclose whether Regional Directors, subsequent to an Advice decision, will refer to them to justify the Agency's decisions. Since the burden of proof rests on the General Counsel, it must be presumed that they may make such references.

making its determination, the exact issue involved, instructions for the final processing of the case, *a detailed legal rationale, including any pertinent Board or Court decisions*" (Operations, p. 4A (emphasis added)) and may also refer to prior Advice memoranda. A. 70, n. 6 (1972 Report, American Bar Association, Labor Law Section, p. 244).

An aggrieved party, whose charge the Advice Branch has concluded does not constitute an unfair labor practice, thereafter receives a summary letter from the Regional Director notifying him that the case will be dismissed if it is not voluntarily withdrawn. See, e.g., A. 12, but see A. 18 and A. 21-23. Such a refusal to issue a complaint may, in turn, be appealed to the General Counsel's Office of Appeals within ten days; however, the charging party is not permitted to see the Advice decision from which he must appeal. Absent such an appeal, further action in the case is entirely foreclosed. Of those who do choose to incur the additional expense of an appeal, only one in twenty succeed in obtaining issuance of a complaint and resultant access to the Board's processes. Operations, p. 15A.

B. The Appeals Memoranda

In contrast to the Advice Branch, which only concerns itself with the "interpretation and application of legal principles" (Operations, p. 3A) in "formulating policy" for the agency, the Office of Appeals considers an entire case—not simply a narrow legal question. Operations, p. 11A. Notwithstanding whether the case has previously been one of the few considered by Advice, if an appeal is taken, a procedure similar to that utilized in the Advice Branch is followed. Operations, pp. 11A-14A. The matter is assigned to a staff attorney who prepares a memorandum—the "agenda minute" (Pet. br., p. 7, n. 7)—containing a statement of the facts, an analysis of the issues involved and a recommendation for the disposition of the appeal. After a supervising attorney

has reviewed the "Agenda minute" and noted any disagreement, the staff attorney presents the memorandum to an agenda composed of the ranking members of the Office of Appeals. On the basis of such an analysis, the deliberation of the agenda and any oral presentation by the parties (which is occasionally permitted) the decision of the Office of Appeals is made. This decision is reduced to a memorandum entitled "General Counsel's Minute" —commonly referred to as an "Appeals memorandum" or "decision"—which is cleared, "in the usual manner", through the Special Assistant to the General Counsel. These "General Counsel's Minutes"—not the pre-decisional "agenda minutes" or any other documents—are here at issue.[9] Such decisions, contrary to the General Counsel's brief, are then centrally indexed by subject-matter.[10] The parties are advised by a summary letter (Pet. App. C, pp. 7a-8a) which, if adverse, closes the matter. Operations, p. 13A.

C. The Instant Litigation

Following repeated denials of Sears' request for access to the Appeals and Advice memoranda by the General Counsel, Sears commenced the instant action in August, 1971. In February, 1972, six months later and nearly eight months after Sears first sought access to the decisions, the General Counsel announced that Sears would be provided a portion, but not all, of the information sought under certain specified conditions.[11] Specif-

9. The District Court, while ordering the production of "Appeals memoranda" which, in fact, are the General Counsel's Minutes, inadvertently referred to them in its opinion in one place as "agenda minutes" (Pet. App. C, p. 7A)—a different document not sought by Sears. The parties, however, have both recognized this error. Pet. br., p. 7, n. 7.

10. The General Counsel represented to the lower courts that the Appeals decisions—General Counsel's Minutes—have been indexed by subject matter since August, 1971. See, e.g., Appellant's br. in the Court of Appeals, p. 29, n. 23, and p. 16, n. 11.

11. The disclosure was made subject to the following conditions:

(1) Memoranda decisions would not be supplied until all litigation respecting the case had been concluded;

ically, the General Counsel made available to Sears a secret index to Advice memoranda in closed cases; those Advice memoranda in closed cases which Sears selected from that index; and those Appeals memoranda selected by Sears. The General Counsel refused to produce, however, the Advice or Appeals memoranda in any pending cases, including that involving the decision on the charge filed by Sears (Board Case No. 19-CB-1673) which originally triggered this litigation. In addition, after Sears discovered that the memoranda often relied substantially upon outside materials, e.g., the language of a provision of the collective bargaining agreement being construed, or simply referred to the "circumstances of the case," the General Counsel refused Sears' requested access to any additional documents.[12] Finally, the General Counsel repeatedly stated that disclosure was only for purposes of this case and not because of any obligation to produce any memoranda, indices or supporting documents under the Information Act.

Before the District Court the General Counsel adduced no evidence or affidavits. Basically the entire record below, upon which the General Counsel must sustain his burden of proof under the Act, consists of several samples of the disputed Advice and Appeals memoranda which were agreed to be representative samples (see *Environmental Protection Agency* v. *Mink*,

(2) Memoranda respecting cases where litigation had been concluded or involving final administrative dismissals would be supplied in a "sanitized" form only, identifying references to earlier Advice or Appeals memoranda, although cited for precedential value, would be deleted; and

(3) No underlying factual data and/or documentation would be supplied even where such data is relied upon in the memoranda but is insufficiently described therein. A. 42-44.

12. Sears clearly identified for the General Counsel each of the decisions and other materials which it desired. With regard to those cases sought by Sears which relied upon the "circumstances of the case," Sears suggested the production of the parties' briefs, the Regional Director's statement of the facts, or any other information which the General Counsel would be willing to make available to fill the void in the decisions without requiring the production of the General Counsel's entire file. A. 89-91, 137-139.

410 U. S. 73 (1973)), a statement of material facts, and the concession that Operations (see n. 6, *supra*) is a substantially accurate description of the General Counsel's operations.[13]

The General Counsel argued in the lower courts only that the disputed memoranda represented recorded policy deliberations, prior to the formulation of any decision, and, therefore, were intra-agency memoranda within the meaning of Exemption 5. Paradoxically, although the General Counsel repeatedly contended in both courts below that the disputed Advice and Appeals memoranda could contain "settlement suggestions," "discussion of possible defenses and prosecution approaches," "apprise Regional Director of possible future problems on internal procedural matters," and "reflect difficulties perceived by staff members in reach[ing] the final decision" (see General Counsel's Points and Authorities filed on June 21, 1974 in the District Court, pp. 4, 18; and the General Counsel's principal brief in the Court of Appeals, pp. 18, 20), it was finally admitted in the General Counsel's Reply Brief before the court below (pp. 4-5) that the representative examples presented to the District Court contained no such material. Sears argued in response that the disputed memoranda contained substantive agency law on all "the new questions arising in the field of labor relations" (Pet. App. C, p. 6a) and thus constituted the instructions and final opinions of the agency, *i.e.*, the General Counsel. Sears also disputed the General Counsel's only other contention, that documents incorporated by reference into the disputed memoranda were exempt under Exemption 7 notwithstanding their incorporation.

The District Court concluded that, after consideration of the undisputed facts and review of the representative samples, that

13. Before the Court of Appeals, in answer to a direct question from Judge Robb, counsel for the General Counsel reaffirmed that the procedure set forth in Operations "is basically correct". The General Counsel, has in its present brief to this Court, also relied on Operations as a correct statement of the General Counsel's procedures. Pet. br., p. 5.

the Advice and Appeals memoranda were "instructions" affecting the public and "final opinions" which were required to be disclosed under the Act. The District Court also required, subject to deletion of the names of affiants, settlement suggestions and other independently exempt matters, that where the memoranda expressly incorporated by reference other documents or explanatory material, such information was to be considered part of the memoranda. Pet. App. C, pp. 8a-10a. This decision was affirmed, without opinion, by Judges Miller, Wright and Robb of the Court of Appeals in a *per curiam* decision on the basis of the District Court's decision and *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 482 F. 2d 710 (D. C. Cir. 1973).

SUMMARY OF ARGUMENT

1. The courts below properly found that Advice and Appeals decisions are not "intra-agency memoranda" within the meaning of Exemption 5, but, instead, are the substantive, binding law of the agency. Accordingly, without regard to whether they are categorized as (1) "final opinions," (2) "statements of policy or interpretations adopted by the agency" or (3) "administrative instructions" which affect the public, the test of Exemption 5, *i.e.*, whether documents are discoverable, is irrelevant because the entire exemption is inapplicable. The test of Exemption 5, as this Court recognized in *Environmental Protection Agency* v. *Mink*, is utilized to distinguish between disclosable factual data contained in intra-agency memoranda: the records of the pre-decisional deliberations to which Exemption 5 was strictly delimited.[14] Here the issue is wholly different. What is sought in this case is the law of the General Counsel as an independent agency—the *result* of its decisional process rather

14. In *Mink*, the opening premise of this Court's discussion was that the documents at issue there were, in fact, "intra-agency memoranda" within the meaning of the Information Act. 410 U.S. at 85. It is this initial premise which is in dispute in the instant case.

than any pre-decisional discussions. The very fact that the brunt of the documents at issue are now being disclosed, as a matter of grace, surely belies any claim that the agency's decisional process is being improperly placed in a "goldfish bowl", and strongly militates in favor of recognizing that such documents are the actual substantive law and policy that is applied to the public on a day to day basis or, in other words, the law of the agency that determines a private individual's access to the remedial processes under the national labor scheme.

2. The lower courts were not asked by the General Counsel to consider whether Advice and Appeals decisions are part of investigatory files within the meaning of Exemption 7 of the Information Act. In any event, Sears submits that they are not. These decisions, after all, are centrally filed and indexed by subject-matter in Washington apart from any individual investigatory files.[15] This central system is admittedly used as a "research tool" (A. 149) in the decision of future cases in order to develop a uniform labor law.[16] Accordingly, these memoranda are *not* restricted to the investigatory files, but are used and relied on, as well as cited (A. 70, n. 6), as authority within the agency. To permit an agency to hide such decisional law behind the protection intended only for its investigatory materials would improperly distort the purposes of Exemption 7.

3. The General Counsel's claim that Exemption 2 applies to Advice and Appeals decisions is equally belated and similarly without merit. Although the courts below were not afforded an opportunity to address this issue, the General Counsel's construction of Exemption 2 has been uniformly rejected

15. Although, as the General Counsel claims, the indexing of Appeals decisions by subject matter did not commence until August, 1971, even before that date separate chronological files of all Appeals decisions were kept in Washington.

16. Since there is no dispute as to the use of the Advice index, the Appeals index must also be assumed to be similarly used absent a showing to the contrary.

by three courts of appeals[17] and the leading commentator in the area.[18] Exemption 2 was intended to protect precisely what is stated in the Exemption and nothing more; records "related *solely* to internal personnel rules and practices" (emphasis added). The purpose clearly was to exclude any member of the public from intruding into a limited area of no public concern, i.e., documents "related solely" to internal personnel matters. The final and binding law of an agency manifestly is not encompassed by this limited purpose.

4. Finally, the courts below, after recognizing that the documents here at issue were the law of the agency which must be disclosed, were correct in requiring that materials incorporated by reference therein must also be revealed. Otherwise, such a technique could obscure the real agency decision and effectively evade the disclosure mandated by Congress.

ARGUMENT

I.

Advice and Appeals Memoranda Are Required to Be Made Available to the Public Under the Act

The General Counsel admittedly possesses a rare power—the unreviewable discretion to determine which cases, and, therefore, what questions of law, will be presented to the Board. To maintain a uniform national labor policy in accord with the Congressional intent, extensive centralized control over the issuance of complaints is naturally necessary. The principles under which this prerogative is exercised are embodied in the Advice and Appeals memoranda sought here: these are the

17. See *Stokes* v. *Brennan*, 476 F. 2d 699 (5th Cir. 1973); *Hawkes* v. *I. R. S.*, 467 F. 2d 787 (6th Cir. 1972); and *Rose* v. *Dept. of the Air Force*, 495 F. 2d 261 (2nd Cir. 1974). To the same effect: *Vaughn* v. *Rosen*, C.A. No. 1753-72 (D.D.C. October 9, 1974), on remand from 484 F. 2d 820 (D.C. Cir. 1973).

18. Davis, Administrative Law Treatise (1970 Supp.), § 3A.17.

only expressions of the complete rationale underlying the decisions of the agency to prosecute or to dismiss a charge.[19] In fact, in the General Counsel's public Quarterly Reports (e.g., A. 150), the General Counsel specifically discloses certain Advice and Appeals decisions to "which [he] directed his personal attention . . . [for the stated purpose of keeping] the public advised of how, when and why I am acting." A. 150. The District Court's decision below assured that, instead of being selectively informed, the public will now be fully informed. Such disclosure enables an individual to conform his action to the agency's understanding of the law applied by that agency and, accordingly, fulfills one of the primary objectives of the Act—to "elucidate" government "actions to the American public". *American Mail Line, Ltd.* v. *Gulick*, 411 F. 2d 696, 699 (D.C. Cir. 1969).

The importance of this substantial body of administrative precedent, heretofore withheld from the public, cannot be minimized. The large majority of unfair labor practice charges are never permitted to reach the Board.[20] It is for this reason that the American Bar Association has consistently urged the General Counsel to disclose Advice and Appeals decisions in order to effectuate the legislative mandate of the Act. Only then can the labor bar effectively advise its clients as to the current state of agency law. Only then can the public, and indeed Congress, be assured that the General Counsel's absolute control of the right to a private remedy is being fairly and equitably applied.

19. Compare, e.g., the letters sent to the parties (A. 199) with the Appeals memoranda in similar cases (A. 205-209, 210-212); and the original letter sent to Sears dismissing its case (A. 12), the more detailed rationale thereafter supplied by the Regional Director at the direction of the General Counsel (A. 18, 21-23), and examples of Advice memoranda in comparable situations. A. 86-87, 194-198. See p. 19, n. 24, *supra*.

20. In fiscal 1972, for example, only 33 per cent of all unfair labor practice charges were found to have merit by the General Counsel and only *six per cent* reached the Board for decision. 37th Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1972.

Thus, as early as 1970, the Labor Law Section of the American Bar Association, consisting of leading members of the labor bar representing both unions and management, concluded:

> [T]hese "precedents" [Advice and Appeals memoranda] constitute precisely the kinds of "final opinions, statements of policy and interpretations" and "instructions to staff that affect a member of the public," which the Freedom of Information Act contemplates should be indexed and made available to the public.

Vol. II 1970 Report, Labor Relations Law Section, American Bar Association, p. 7 (A. 57). The Section has maintained its position to the present and has, with regard to the instant case, urged the General Counsel to comply fully with the decisions of the lower courts. Vol. II, 1971 Report, pp. 233-237, 242-246; Vol. II, 1972 Report, pp. 217-220 (A. 54-73); and see also Vol. II, 1973 Report, p. 244, and 1974 Committee Reports, pp. 249-250. The lower courts' orders comport with this view, and do not delve into the agency's decisional processes—the agenda system of confrontation and discussion—but only direct the production of ". . . the end product . . ." (H. Rep. No. 1497, 89th Cong. 2nd Sess., p. 7 (1966)) of that agenda process—the General Counsel's resultant final law.

In contrast to the substantive content and effect of Advice and Appeals decisions, the record is totally barren of any proof whatsoever that such memoranda refer to trial tactics, settlement directions or discussions of evidence. The General Counsel's reliance upon such claims (Pet. br., p. 21) is totally unfounded. Indeed, at no time did the General Counsel introduce *any* evidence as to privileged information of any kind contained in the memoranda, and subsequently conceded below the absence of such material. Reply brief of the General Counsel in the Court of Appeals, p. 4. In light of this concession as to the absence of such proofs before the District Court, the imaginative *post hoc* rationales of counsel as to what such documents could contain must be wholly disregarded. Cf., e.g., *N. L. R. B.* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 443-444 (1965).

A. Advice Memoranda Constitute Final Opinions, and/or Mandatory Instructions of the General Counsel

The determination made by the Advice Branch is a crucial step in obtaining access to the Board and its remedial powers. Many charging parties undoubtedly fail, as do many litigants in the courts, to appeal. In fact, with only a five per cent chance of obtaining a reversal from the Office of Appeals, the Advice stage is not only critical, but determinative. The General Counsel nevertheless argues that, in effect, that Advice memoranda are merely internal working papers in which opinions are expressed (see *Sterling Drug, Inc.* v. *F.T.C.*, 450 F.2d 698, 704 (D. C. Cir. 1971)) rather than, as the District Court found, final opinions and/or mandatory instructions.[21]

Contrary to the General Counsel's contention, however, the Regional Director's role in implementing Advice memoranda is simply ministerial. Regional Directors are required to submit to Advice all cases involving novel or significant issues. See, e.g., the General Counsel's Quarterly Report at A. 150. The subsequent Advice determination is then uniformly followed by the Regional Directors with, as the General Counsel admits, an exception, if at all, only "in [a] rare case". Pet. br., p. 6. In fact, this asserted "rare" exception is, on the record, nothing more than conjecture. Nowhere in the record is there a *single* instance in which an Advice determination was not followed. In fact, it is necessary, by the General Counsel's own admission to Congress, that Advice cases, on the cutting edge of the law, be handled by the Office of the General Counsel in order to avoid "chaotic development in the law". Operations, p. 7A. Such chaos is avoided through the use of a centralized subject-matter index. The suggestion that Regional Directors can resolve such significant cases inconsistently, and contrary to the General Counsel's own views, is clearly specious. Even the very language of Advice memoranda clashes dramatically with the General Counsel's description of the Advice Branch's relationship with the Regional Directors and further substantiates the Regional Directors' lack of authority in Advice cases. As the memoranda indicate, Regional Directors only issue a complaint after receiving an "authorization" from the Advice Branch. See, e.g., A. 86-87, 88. While Advice considers the Regional Directors "recommendations" (see, e.g., A. 88, 188-189, 190), the Branch draws its own binding "conclusions". See, e.g., A. 194-198. Such final and binding conclusions of an agency, as the District Court found, must be deemed public information.

There is no basis to differentiate between Advice memoranda in open cases and those in closed cases. In each instance, there has been a binding decision of the agency. Open cases, as well as closed cases, are discussed by the General Counsel in his Quarterly Reports. The refusal to provide Advice memoranda in open cases is particularly egregious where, as was the case here, the party seeking the information is an unsuccessful charging party before the agency. In such a case, the General Counsel's

21. The General Counsel has contended that these "instructions" are not "administrative" and, therefore, not within the scope of subsection (a)(2)(c). That subsection requires the disclosure of "administrative staff manuals and instructions to staff that affect a member of the public". Although it is not apparent that "administrative" modifies "instructions", even if such an assumption is made, the "administrative" limitation was only added "to bar disclosure of information which, if known to the public, would significantly impede the [law] enforcement process". *Stokes* v. *Brennan*, 476 F. 2d at 699. This test, it is submitted, is correct and sound, and not an extreme view as contended by the General Counsel (br., p. 43). See Davis Admin. Law Treatise. (1970 supp.), § 3A.12. In light of the concession by the General Counsel that the memoranda are devoid of tactical litigation material (Court of Appeals Reply br., p. 4), Sears submits that disclosure of agency law will not "significantly impede" law enforcement but will, instead, have the salutory effect of permitting the public through a well informed labor bar "to conform [its] actions to an agency's understanding of the law". *Hawkes* v. *I.R.S.* 467 F. 2d at 795. Indeed, in drafting the administrative restriction, the Senate Report expressly recognized the Information Act's application to a prosecutorial agency, and drew a distinction between "traditional confidential instructions" and the "basis for administrative action". The latter, which is involved here, was intended to be open to "public examintion". Sen. Rep. No. 813, 89th Cong., 1st Sess. (1965), p. 2.

present policy of denying a charging party the full "legal rationale" (Operations, p. 4A.) for the dismissal of his charge is unfair as well as impermissible under the Act which was intended "to enabl[e] the public . . . to deal effectively and upon equal footing with" the Agency.[22] Instead of being properly apprised of the argument he must confront upon appeal, the Regional Director only sends the charging party "a simple statement" (NLRB Rules and Regulations, Sec. 102.19),[23] which the American Bar Association found "as a rule, does *not* apprise the parties of the issues and rationale which led to the dismissal of the charge". Vol. II, 1972 Report, p. 219 (emphasis added). The General Counsel has also conceded, during this litigation, that a dismissal letter is different from the Advice opinion. A. 29-31.[24] This gap between the Advice memoranda, representing the agency's actual decision, and the Regional Director's perfunctory dismissal letter constitutes the very type of secret law that the Act was meant to preclude.

22. S. Rep. 1219, 88th Cong., 2d Sess., p. 3; see also S. Rep. No. 813, 89th Cong. 1st Sess., p. 7, where it was stated that one purpose of the Act was to ". . . prevent a citizen from losing a controversy with an agency because of some obscure or hidden order or opinion. . . ."

23. By contrast, the same Regulations require the charging party, if he wishes to appeal, to file "a complete statement setting forth the facts and reasons upon which it is based". N.L.R.B. Rules and Regulations, Sec. 102.19.

24. For instance, in the underlying Board case here, Sears was only given the particular reasons for the adverse Advice decision after the General Counsel himself explicitly directed the Regional Director to reveal that rationale. A. 18, 21-23. Only then was Sears ostensibly apprised of the legal conclusions its appeal had to meet and, therefore, was able to formulate a "meaningful" argument in its appeal. Cf. *American Line, Ltd. et al.* v. *Gulick*, 411 F. 2d at 704. Yet, even now, there is no way of knowing whether the full rationale was ever revealed and there is no indication that a similar explication has ever been given to any other party.

B. Appeals Memoranda Constitute Final Opinions Of The General Counsel

As in the Advice Branch, the Office of Appeals employs an "agenda" from which a decision issues for the approval of either the General Counsel or his Special Assistant. Operations, p. 13A. If approved, the Appeals memoranda sought here—the General Counsel's Minute—is issued to the Regional Director, but not the parties, in cases where the Office of Appeals reverses and orders the issuance of a complaint.[25] As with Advice memoranda, however, such Appeals memoranda constitute a "final opinion" which concludes all proceedings before the Office of the General Counsel. The fact that, under a new policy, an additional expanded letter, which the General Counsel already concedes to be within the scope of the Act, is now sent to the parties does not detract from the inherent public nature of the Appeals memoranda. A comparison of the two documents reveals the new letters to be incomplete. Compare, e.g., A. 199 with A. 205-212. The Appeals memoranda, as the only complete agency decisions, are required to be made public.

C. The General Counsel Can Issue Final Opinions Within the Meaning of the Act

Notwithstanding the General Counsel's concession that he constitutes an "agency", the General Counsel now asserts that he is incapable of issuing a final opinion, Pet. br., p. 45. Specifically, he takes the position that he does not adjudicate and therefore, cannot issue a "final opinion . . . made in the adjudication of cases". 5 U.S.C. 552(a)(2)(A). This assertion wholly disregards the express terms of the statute. As an independent agency, the General Counsel's decision whether to prosecute is clearly an "order" which is statutorily defined as "the whole

25. Prior to April, 1971, a General Counsel's Minute was written and filed in *all* Appeals cases. Pet. br., p. 7, n. 6. Such memoranda are now written only after the Office of Appeals decides to direct the issuance of a complaint.

or any part of the final disposition . . . af *any agency* [i.e., the General Counsel] *in any matter* other than rule making but including licensing". Section 2(d) of Administrative Procedure Act 60 Stat. 237 (1946) (codified at 5 U.S.C. 551(6)) (emphasis added). An adjudication, in turn, is defined in the same section as any "agency process for the formulation of an order". In short, the decision to prosecute or withhold prosecution is an "order" and the "process" in formulating that order fulfills the requirements of an "adjudication". Since Advice and Appeals decisions can constitute in any given situation the Agency's final action, as already shown, they constitute "final opinions made in the adjudication of cases" and must, therefore, be disclosed. See also Davis Admin. Law Treatise (Supp. 1970), § 3A.8.

D. Both Advice and Appeals Memoranda Are Also Unpublished "Interpretations of the Agency" Subject to Disclosure

Wholly apart from whether Advice and Appeals decisions are "final opinions" and/or "administrative instructions" affecting the public, Sears submits, as it originally alleged, that they are unpublished "statements of policy and interpretations . . . adopted by the Agency". 5 U.S.C. 552(a)(2)(B). At the threshold, there is no doubt that the disputed documents are "interpretations", i.e., the application of the law to a set of facts. The question then is whether these interpretations have been "adopted by the Agency", the General Counsel. There is no ambiguity in this language; "the ordinary meaning of those words reaches any interpretation, as here, issued by the Agency or its delegates acting within their scope of authority". *Tax Analysts and Advocates* v. *I.R.S.*, 362 F. Supp. 1298, 1303 (D.D.C. 1973), *aff'd.* ..... F. 2d ..... (D.C. Cir. August 19, 1974).[26] See also

26. Upon appeal in *Tax Analysts*, the Justice Department, representing the Internal Revenue Service, conceded that documents highly similar to those here at issue were interpretations adopted by that agency. There, as here, the documents were centrally indexed and used as a research tool, at least in part, and represented the agency's view of a single situation. Those documents were the agency's decision not to claim that members of the public violated the Internal Revenue Code, i.e., a decision not to prosecute.

Hanover Bank v. *Commissioner*, 369 U.S. 672, 686 (1962); Davis Admin. Law Treatise (1970 Supp.), § 3A.9. Contrary to the General Counsel's position (Pet. br., p. 42, n. 30), the fact that an interpretation has been "adopted" and applied does not require that it be a binding precedent, nor, therefore, is it necessary that an "interpretation" be binding precedent to be subject to the Act. Notwithstanding any binding effect, an interpretation applied by the General Counsel represents the agency's current view of the law. The failure to disclose that current view can accomplish but one purpose: the concealment of arbitrary or unjustifiably inconsistent decisions notwithstanding that such disclosure is one of the Act's objectives.[27]

Disclosure is especially necessary in the instant case where many of these disputed documents are, in fact, effective precedents: they are centrally indexed by legal issue; prior Advice memoranda are cited as authority in Advice cases (A. 70, n. 6); the agency attempts to maintain uniformity in its application of the law; the indices are used for that purpose; the Regions obey the decisions issued from Washington; and, as future cases arise in any region, the previous decisions issued from Washington are presumably binding in order to achieve the object of attaining uniformity in the issuance of complaints.

E. The Act's Exemptions Are Inapplicable

Even though the policy of the Act requires that the disclosure requirement be construed broadly and the exemptions narrowly, the General Counsel contends that the requested documents are

27. The structure of the Act amply supports this construction. Section 552(a)(1)(D) requires the publication in the Federal Register of all statements of *general* policy or *interpretations of general applicability* formulated and adopted by the agency. In contrast, Section 552(a)(2)(B) requires the public availability of unpublished "interpretations . . . adopted by the Agency". Interpretations which are *not* of general applicability must be made available, but not published.

"intra-agency" memoranda, part of an investigatory file, or "related solely to the internal personnel rules and practice of an Agency", and, therefore, exempt from disclosure under 5 U.S.C. 552(b). These contentions, it is submitted, are erroneous.

1. *Exemption 5*

In *Mink*, this Court stated that Exemption 5 was to be "narrowly delimited" with the objective only of preventing injury "to the consultative functions of government". 410 U.S. at 87. Accordingly, it follows that the Act "calls for disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy . . . , [while the exemption applies only to] papers which reflect the agency's group thinking process of working out its policy and determining what its law shall be," Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 797 (1967). As a result, while the "intra-agency" Exemption may apply to materials prepared for use within an Appeals or Advice *agenda*, the sought-after memoranda, which constitute, as demonstrated above, "the end product" of the decisional process applied to the public are not covered. The fact that documents may pass between agency personnel for implementation does not alter their nature, nor should it bring them within the narrow scope of the exemptions. Congress intended to protect only the free flow of information and ideas and did not "design [the exemption] to facilitate the easy exchange of *substantive declarations of policy*. Indeed, if it were, the exemption would have clearly engulfed the rule." *Sterling* v. *F.T.C.*, 450 F. 2d at 713; Bazelon, J., dissenting in part (emphasis added). Such a construction, needless to say, would be far too expansive since it would improperly permit any agency to throw a protective blanket over all information by simply creating a ministerial bureaucracy to implement the agency's substantive decisions.[28]

28. The discovery standards in Exemption 5 of the Act, upon which the General Counsel substantially relies, are not applicable here. The requested documents, as shown above, are not intra-agency memoranda within the meaning of the Act. Even assuming *arguendo*, however, that the material here constitutes "intra-agency" memoranda, the exemption only limits the production of material that would not be available in discovery during litigation with the agency—rather than a private party. Therefore, the work product rule applied to private attorneys is wholly inapplicable in the circumstances of this case. As Professor Davis observed:

> I think the work product of a private attorney is something altogether different from a basic memorandum by the legal staff of an agency which is used by the agency as a guide in the handling of cases involving private parties. To the extent that such a memorandum states the effective law of the agency, its adoption by the agency makes it something more than the work product of the legal staff. . . .

Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 797 (1967).

2. *Exemption 7*

Notwithstanding that Advice and Appeals memoranda are, as already demonstrated, the law of the agency, the General Counsel contends that such law can be withheld under the guise of its investigatory files. Such a position strikes at core of the Information Act by allowing a system of secret law that the Act was meant to preclude. At issue here are not investigatory files but, instead, a system of law contained in subject-matter files and indices retained in Washington and used for a non-investigatory purpose—the resolution of related future cases.[29] The disclosure of this system of law was not the objective when Exemption 7 was enacted.

Exemption 7 was directed at protecting material such as "the statements of witnesses." 110 Cong. Rec. 17667. Indeed, since Senator Humphrey was acting at the urging of the American Bar Association in formulating Exemption 7 (Pet. br., p. 30), it is revealing that the Labor Law Section of the American Bar Association has consistently sought the disclosure of the docu-

29. The General Counsel has expressly conceded that Advice indices and files are referred to and used to assure that future cases are decided uniformly. Absent a showing to the contrary by the agency, it must be assumed that the New Appeals index is similarly used.

ments at issue (pp. 15, 18-19, *supra*)—a clear recognition of the distinction between the memoranda here at issue and the investigatory materials and affidavits contained in the regional files. The General Counsel's efforts to describe the memoranda "as a selective summary of investigative results" (br., p. 32) is clearly hyperbole. It is belied by both the General Counsel's failure to make such a claim before the lower court and the representative samples of such documents contained in the record and available for this Court's examination. With regard to any overlap in individual situations between regional investigatory data and the Washington subject-matter files and indices involving confidential data, the agency has the option under the District Court's order to make the appropriate deletions. The heart of these disputed documents, however, is the interpretation and application of legal principles. The placement of an additional copy of the documents in case files in regional offices cannot be permitted to foreclose public access to the agency's working body of law maintained in its Washington files for use in future cases.

3. *Exemption 2*

The language of Exemption 2 is seemingly clear in only exempting from disclosure matters:

> . . . related solely to the internal personnel rules and practices of an Agency.

The purpose of the Exemption is thus narrowly limited to matters, unlike those here, involving the relationship of the federal government as an employer and of no impact on the public, i.e., "related solely" to internal personnel matters. The General Counsel, after having apparently acceded to this obvious meaning, now seeks to distort this Exemption by relying on an argument rejected by three courts of appeals[30] and

30. *Stokes* v. *Brennan*, 476 F. 2d 699 (5th Cir. 1973); (*Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787 (6th Cir. 1972); *Rose* v. *Dept. of Air Force*, 495 F. 2d 261 (2nd Cir. 1974).

Professor Davis.[31] In effect, his argument is that the words of the exemption conflict with *half* the legislative history, the House Committee report, and the latter must be accepted. There is, however, "no need to refer to the legislative history where the statutory language is clear". *Ex Parte Collett* 337 U.S. 55, 61 (1949). As this Court has stated:

> The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.

Gemsco v. *Walling*, 324 U.S. 244, 260 (1945). This proposition is especially applicable in the instant case where the legislative history relied on by the General Counsel has been severely criticized as being "not the law" and "contrary to the needs of fairness, contrary to the report of the Senate Committee, and *contrary to the clear words of the statute*". Davis, Admin. Law Treatise (1970 Supp.) §§ 3A.9, 3A.31 (emphasis added).

The Senate Committee report, moreover, in contrast to the House Committee report, is true to the language of Exemption 2 by indicating that: "Examples of [exempt matters] may be rules as to personnels use of parking facilities or regulation of lunch hours, statements of policy as to sick leave *and the like.*" No. 813, 89th Cong. 1st Sess. (1965), p. 8 (emphasis added). This narrow scope of the exemption, Sears submits, is proper. The General Counsel's reliance on highly different language contained in the House Committee report which, in the words of Professor Davis, ". . . once again tries to change the meaning of the legislative language . . ." (Admin. Law Treatise (1970 Supp.), § 3A.17), is misplaced.

31. Davis, Admin. Law Treatise (1970 Supp.), § 3A.17.

This language in the House report, which is, in turn, relied on by the Attorney General's Memorandum[32]—the General Counsel's other primary authority—was not written until after the Act had "passed the Senate on the basis of a committee report which was faithful to the words of the bill". Davis, § 3A.31. Thereafter, the House Committee yielded to heavy pressure from the agencies, but failed to amend the bill and instead drafted restrictions in its Report which "contradict the words of the bill and . . . the Senate committee report". *Id.* The reliance on these contradictions by the General Counsel and the Attorney General constitutes an abuse of legislative history that cannot be permitted. Exemption 2 applies only to items of no impact upon the public, that is, matters "related solely" to internal personnel affairs. The memoranda here at issue do not fit that definition, and must, therefore, be disclosed.

II.

The District Court Properly Required the Production of the Complete Advice and Appeals Memoranda

In the course of examining the Advice and Appeals memoranda to which Sears was afforded access, Sears' attorneys observed, and the District Court agreed (Pet. App. C, p. 8a-9a), that a substantial portion of the decisions inspected were incomplete in that they incorporated by reference and relied upon provisions of various extraneous documents—e.g., collective bargaining agreements or contract interpretations—without describing or attaching such documents to the memoranda. A. 75-79, A. 88, but see A. 81-82. Moreover, the majority of the Appeals memoranda, rather than stating the significant facts upon which the decision hinged, relied upon the "circumstances

32. Congress placed the primary responsibility of administering the Information Act in the federal courts to protect the public from the agencies. The Attorney General's Memorandum constitutes, therefore, nothing more than an adversarial viewpoint seeking to restrict the scope of the congressional mandate.

of the case". Such techniques in drafting public decisions embodying the agency's law circumvent, as the lower courts recognized, the policies of the Act.[33]

A. Those Documents Incorporated by Reference Must Be Disclosed

First, with regard to the specific documents expressly incorporated into memoranda, it follows that, if the Advice and Appeals decisions must be made public, that information which is incorporated into such documents must likewise be disclosed. The fundamental difference between the General Counsel's position and that of Sears is basically the General Counsel's continuing failure to recognize that the memoranda are, as already demonstrated, the law of the agency which must be disclosed. Whether the agency intended to or wants to disclose its law is irrelevant. The meaning of that law cannot be hidden by short hand techniques which obfuscate for the public the meaning of its decisions. If an agency refers to or relies upon a document as part of what the General Counsel calls an "efficient" method of drafting an agency decision, it cannot refuse to disclose that document. Regardless of what exempt status the document might otherwise have, through incorporation it has become a part of the decision itself. For instance, a decision which revolves about the construction of a contract clause is absolutely meaningless if the language of the pertinent contract provision is not disclosed. It does not matter that the contract might otherwise be exempt

33. As the Labor Law Section of the American Bar Association stated in its 1973 Report, Vol. II, p. 244:

> Your Committee continues to adhere to the view that where documents are expressly incorporated by reference in [Advice and Appeals] memoranda, they should be produced; that where memoranda rely upon "circumstances of the case" or some other vague or imprecise reference without delineating such circumstances, explanatory material should also be made available unless exempt under the Act; that the General Counsel should not delete material without fully explaining or justifying the basis for such deletion; and that unless there are clear extenuating circumstances, documents requested should be produced with reasonable promptness.

from disclosure. The General Counsel has chosen a particular method of writing its decisions and cannot now use that method as an excuse to prevent disclosure.

Second, the device of relying on the "circumstances of the case" in a decision, without delineating those circumstances, also emasculates the decision and, accordingly, renders the public's right to disclosure meaningless. In such a form the public is being deprived of a substantive body of agency law that the Act was meant to disclose. See, e.g., A. 75-79; cf. A. 81-82. Parties cannot be required "to operate in a darkroom". *American Mail Line, Ltd.* v. *Gulick*, 411 F. 2d at 703. Such decisions, it cannot be forgotten, are, as the American Bar Association Labor Section has recognized (pp. 18-19, *supra*), the *only* document containing the legal rationale of the agency's decision. The use of a shorthand phrase to refer agency personnel to other documents cannot be used to circumvent access to these critical formulations of policy.

B. The District Court's Order Is a Proper Method of Curbing Circumvention of the Act's Disclosure Requirements

The District Court's order was carefully molded to best achieve the objectives of the Act. The Court did not order, nor did Sears ever suggest, that the General Counsel produce its "entire investigatory files" as the General Counsel would have this Court believe. Nor did it order the production of witnesses' affidavits as the General Counsel implies. In fact, the Court carefully permitted the General Counsel to delete the names of affiants from its public decisions and, with regard to providing explanatory material to fill the void created by the General Counsel's references to the "circumstances of the case", the Court expressly permitted the General Counsel to withhold documents "exempt under the Act". In sum, the Court did not order, nor does Sears want, the General Counsel's investigatory files. Indeed, the Court granted the General Counsel the discretion of selecting the appropriate method of filling the gaps in his decisions rather than ordering the production of specific documents as Sears had requested. A. 89-91; A. 137-139. The General Counsel may now disclose the Regional Director's statement of the facts, the parties' briefs (which are currently disclosed to the parties by the Office of Appeals), or any other document the General Counsel chooses, as long as the pertinent, but missing, facts are supplied.

CONCLUSION

For each of the foregoing reasons, it is respectfully requested that the judgment of the District Court and Court of Appeals be affirmed.

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APPENDIX

OPERATIONS OF THE OFFICE OF NLRB GENERAL COUNSEL

[The following statements explaining certain operations of the Office of General Counsel of The National Labor Relations Board were submitted by NLRB General Counsel on June 29, 1961 to a House Labor Subcommittee on the NLRB.]

Advising NLRB Regional Offices

A major segment of the General Counsel's policy-making functions is placed in the Regional Office Advice Branch which constitutes a subdivision of the Division of Operations. The Advice Branch is headed by an Assistant General Counsel, who, with the assistance of an Associate Branch Chief, supervises and coordinates the work of 24 attorneys.

Essentially, the function of the Advice Branch is what its name implies It formulates for the approval of the General Counsel, uniform policies in novel, unsettled or ambiguous areas of the law and furnishes advice to the various Regional Offices regarding the appropriate course of action in specific cases.

The Branch processes approximately 130 cases per month which reach the Washington office through two main channels. First, Regional Directors, at their own discretion, may submit those cases for advice which, in the opinion of the Regional Director, present either novel or complex issues which the Regional Director wishes to have resolved by the Washington office. Similarly, where Regional Directors are confronted with either complicating Board or Court precedent, or believe that the specific area of the law is ambiguous, they may, at their discretion seek advice from Washington.

The second major channel of communication in this area involves those categories of cases which Regional Directors are

required to submit for advice because they concern issues wherein a uniform policy determination is essential to the sound and fair administration of the Act. Essentially, those cases fall in the following categories:

1. Cases involving the interpretation of the recently enacted amendments to the National Labor Relations Act, such as Section 8(b)(7) of the Act which concerns recognition and organizational picketing; Section 8(e) of the Act, which outlaws hot cargo contracts; and Section 8(f) of the Act which exempts the building and construction industry from certain provisions of the Act.

2. Cases which involve the interpretation of major Board or Court pronouncements which require analytical study and subsequent uniform application. Examples of such situations are cases involving hiring halls in the maritime industry; the validity of certain union security provisions such as agency shop clauses in so-called right-to-work States; and certain remedial problems such as the disgorgement of illegally withheld union dues.

3. Certain building and construction industry cases. The submission of these cases for advice is required because the building and construction industry, by it very nature, has certain unique problems which have traditionally required the closest attention by the Washington office. To mention but one of these it is, of course, generally known that due to the temporary nature of building projects and the fluid labor force engaged in construction work, the Board has encountered considerable difficulties in holding representation elections among building and construction employees. From this, of course, flows a number of problems which make the uniform application of the Act in this particular industry extremely difficult.

From time to time, as definitive policy determinations are reached in Washington, many of these areas are redelegated to the Regional Directors and the submission of such cases for advice again reverts to the discretion of the Regional Director.

Regarding the mandatory submission of cases, those points should be emphasized. In the first place, the fact that certain

cases, and these do not constitute more than approximately 5% of the total case load, must be submitted to the Advice Branch, must not in any way be construed as a lack of confidence in the Regional Director or the Regional Officer staff. On the contrary, it is our opinion that the Regional Directors and their staffs are highly competent and are an integral and essential part of the General Counsel's policy-making function. Thus, cases submitted for advice are invariably accompanied by recommendations formulated by the Regional Directors and their staffs, thereby enabling the Washington office to fully utilize the experience and thinking of the entire Regional staff. However, it can readily be seen that if 28 regional directors were to interpret novel legal issues and apply these interpretations within the confines of their Regions without any coordination by the Washington office, the end result would indeed be chaotic. Thus, the law would be interpreted and applied in one way in New York and in an entirely different way in Chicago, or San Francisco, or Atlanta. It must be stressed, therefore, that the advice function supplied by the Washington office is essential to a fair and uniform administration of the Act.

Secondly, the Advice Branch does not ordinarily review the Regional Director's factual determinations and conclusions and it does not interfere with the investigatory duties of the Regional Office, but rather, concerns itself with the interpretation and application of legal principles.

So much for the functions of this particular Branch. The actual operations of the Branch are as follows:

Cases submitted by Regional Directors are assigned by the Branch Chief or Assistant Branch Chief to individual staff attorneys. The attorney, studies the Regional Office submission memorandum which sets forth the facts of the case, the issues on which advice is sought, and the Regional Office's recommended action. The Advice attorney, in most cases, also reviews the case file in order to clarify any ambiguities or to ascertain whether there are

other legal or factual issues which should be considered. The reviewing attorney researches all cases in point and ascertains the applicability of prior advice determinations in similar or related cases. Having been reviewed the case is then submitted for further consideration to an Agenda. This Agenda, depending on the complexity of the case, is attended by various members of the General Counsel's staff. Ordinarily the participants at the Agenda meetings are: the Assistant General Counsel in charge of Advice, the Associate Branch Chief, the Assistant General Counsel in charge of District Court Litigation, the Special Assistant to the General Counsel, the attorney and supervisor who reviewed the specific case, and in many instances, the Associate General Counsel in charge of the Division of Litigation. Again, depending on the complexity of the case, cases may be submitted to the Agenda orally or by written memorandum. However, all submissions to the Agenda include the Regional Office's recommendations, together with any concurrence or disagreement by the Advice Branch. The Agenda decision is submitted to the General Counsel by the Branch Chief or Associate Branch Chief, together with any dissenting opinions. In special cases involving extremely complex issues, the General Counsel may schedule special Agendas and invite other staff members to submit their recommendations.

The General Counsel's final determination is communicated to the Regional Office by way of a memorandum from the Advice Branch. In order to avoid any misunderstanding between the Regional Office and the Advice Branch, this memorandum ordinarily recites the facts upon which the Advice Branch relied in making its determination, the exact issue involved, instructions for the final processing of the case, and a detailed legal rationale, including any pertinent Board or Court decisions.

Because of the complexity or novelty of the cases submitted for advice, parties occasionally, and in approximately 1% of the cases, seek personal conferences with the General Counsel or the Assistant General Counsel. Since it is of the utmost importance

to understand fully the issues, as well as the positions of the parties in these cases, such meetings are ordinarily arranged. However, in order to avoid any semblance of ex parte proceedings, all other parties in the case are invariably and immediately notified of such meetings and are given an equal opportunity to meet with the General Counsel or the Assistant General Counsel and fully state their position.

It must be emphasized, of course, that the number of cases submitted for advice represents but a fraction of the overall case load handled by the Regional Offices. Thus, during the past two years an average of 10% of the total case loads has been submitted for advice. In this respect, it is also noteworthy that although the Advice Branch concerns itself with the most complex and novel legal issues and does not review de novo the factual conclusions of the Regional Offices, the litigation success during fiscal year 1960 was 82%. It must also be noted, however, that during the first half of fiscal 1961, this litigation success was reduced to 63% of the cases so far decided by Board decision or Intermediate Report. The difference may well be explained by the fact that a large number of cases involving the Landrum-Griffin Amendments to the Act have not as yet reached Board or Court determinations, but have been decided in a variety of ways by individual Trial Examiners.

It should be noted that the Advice Branch, like other operations of the General Counsel, is concerned with a speedy resolution of the issues presented to it. However, while time targets have been set for handling of advice cases, it is fully recognized, as in the time targets in the Regional Offices, that disposition of a case within the allotted time—10 days—is an aim and not a strait-jacket. Flexibility with respect to the time for handling of cases is an absolute necessity and is recorded in the day-to-day execution of the advice function. Thus, cases of great complexity and difficulty may often exceed the 10-day period, while other cases with relatively simple fact and legal issues are handled in less than 20 days. Also, cases which have

statutory priority, and especially 8(b)(7) cases wherein the Statute specifically stresses the expeditious resolutions of the case, are handled in a much shorter period than 10 days.

It should also be noted that these time targets cannot and do not apply to cases which may be deferred pending decision in related cases by the Board, Supreme Court or Circuit Courts of Appeals. For example, "flag of convenience" cases which were required to be submitted for advice, had been deferred pending the Board's decision in the *West India Fruit* case [1961 CCH NLRB Decisions ¶ 9654]. Similarly, cases involving agency shop issues in right-to-work States, have been deferred pending the Board's decision in *General Motors* [1961 CCH NLRB Decisions ¶ 9663], a decision which is presently pending consideration by the Board. Also, as an example, cases involving the *News Syndicate* issue, recently decided by the Supreme Court [42 LC ¶ 16,889], were deferred pending the Supreme Court's disposition of this issue.

In addition to the above, cases involving identical or similar issues may be decided together so that, on occasion, a specific case may be delayed until another related case is ready for disposition. Such deferral of a case is, of course done in the interest of uniformity in approach.

Despite the great flexibility in the time targets and the overriding consideration that on no occasion will quality of the decision be subordinated to a time target, the Advice Branch is able to show impressive gains in the speedy resolution of cases. Thus, in December 1958, the mean average for handling of an advice case was 29.3 calendar days. By December 1959, six months after General Counsel Stuart Rothman assumed office, this figure was reduced to 14.9. By June 1960, the mean average days for the processing of an advice case was 11.8 calendar days. By December 1960, this was reduced to 11.1, and by March 1961, the mean average was 10.9 calendar days.

Nature of the "Advice" Function

Since 1947, when the Office of the General Counsel of the National Labor Relations Board was created, some kind of advice function has been performed at the Washington level with respect, *inter alia*, to significant, novel or complex cases and cases where uniformity in approach was of particular importance.

Absent some kind of centralized advice section into which important novel and complex level issues can be channeled, the risk of chaotic development in the law would be marked. For, were Regional Directors left entirely free in this regard, each might proceed on his own view of a given legal question with the result that the law could, as a practical matter and before Board decision of the issue, be one thing in one Region and conflicting in others. Such a result would be at odds with the statutory purpose of encouraging stability in labor management relations. And the omission of selective control by the General Counsel, over these important cases would amount to a failure to exercise his statutory role in administering the law.

The advice function is recognized as particularly significant in view of the broad regulatory scope of the Labor Management Relations Act, which encompasses dynamic, interrelated, interacting and sometimes conflicting rights and privileges. Restrictions in one statutory section have often to be considered together with privileges recognized in another. To make the statute's regulatory intent and design meaningful in a complete sense, a uniform approach which keeps in mind all pertinent interests under the statute is necessary.

Also, with respect to the General Counsel's role in interpreting the statute and developing the law thereunder, it should be appreciated that when he authorizes formal proceedings in a case, he becomes an advocate for the theory underlying the complaint which he issues. While the General Counsel may,

on occasion, present a theory to the Board for decision with respect to which the General Counsel is not in entire agreement, this does not mean that any and every question of law must be or should be put to the Board. Nor does it mean that any legal question should be put to the Board, immediately such issue arises. It must be kept in mind that when litigation is begun on a given theory of law, there may be highly unsettling effects in labor management relations while the issue is wending its way through Board litigation and adjudication, Circuit Court adjudication and possible Supreme Court decision. While this is ordinarily a concomitant of any important litigation which has broad impact, such an effect must give one pause in beginning the litigation unless it is believed that there are very strong reasons under the statute to do so. This concern may also be important in deciding when, if at all, litigation of a particular legal issue should appropriately be instituted.

Finally, it should be noted that while the Regional Offices are performing their functions at an extremely high level of competence and dispatch, no one Regional Office deals with more than a fraction of the complex and novel legal questions which are channeled into the Advice Branch. Thus, the experience of having researched, analyzed and hauled generally similar problems of law permits the Advice Branch to supply reasoned, correct and uniform answers to questions which a Regional Director, acting alone, would find extremely troublesome.

What, then, are some of the sources, criteria and factors considered in deciding cases submitted for advice? Many factors may be considered, dependent on the issue posed, and the advice decision may, on occasion, represent a balancing of such factors. In some cases, the course to be taken is clear while in others, it may not be. But in all cases a carefully reasoned basis exists for the conclusion and recommendation reached. Among the sources and factors which may be considered in reaching a conclusion in a given case are:

1. Supreme Court decisions;
2. Controlling Board law;
3. Court law where the Board position is not to the contrary;
4. Clear statutory language;
5. Legislative history;
6. The general policy of the Act;
7. The ascertainable purposes of the particular statutory sections involved in the case;
8. The impact of the alternative courses on settled law;
9. The individual case as an appropriate vehicle for testing a given issue;
10. The time and circumstances under which the issue arises in relation to the developing Board law; (This may include seeking reexamination of prior Board decisions.)

Examples of the utilization of each or combinations of these criteria could be readily given. In the interest of bervity, however, only one problem, but a highly important one, is discussed as an example. The question for advice was the disposition of concurrent charges of 8(a)(5) and 8(b)(7)(C) violation.

In considering the problem of the concurrent 8(b)(7)—8(a)(5) case, the primary alternatives were, on the one hand, to take the position that despite the existence of a meritorious 8(a)(5) case, the union's picketing to protest this illegal refusal to recognize and bargain nevertheless violated Section 8(b)(7). On the other hand was the alternative of deciding administratively that a Section 8(a)(7) charge lacked merit if the employer who was being picketed was illegally refusing to bargain with the union.

The procedure, recommended to and adopted by the General Counsel, was to defer proceedings on an 8(b)(7) charge where the employer involved, was concurrently and illegally refusing to bargain, as determined by an investigation of an 8(a)(5)

charge. This was considered to be warranted in view of the highly unsettling effect the alternative procedure would have, particularly with respect to the rights of employees and unions recognized under Wagner and Taft-Hartley. The alternative procedure, as noted, was to process concurrently the 8(b)(7) charge and the 8(a)(5) charge, thus requiring an injunction of the union's picketing while simultaneously taking the position in the 8(a)(5) case that the employer was *illegally withholding recognition* from the union. For reasons noted, the General Counsel was reluctant to adopt this position until some guidance could be obtained from Board's decisions in the 8(b)(7) area.

The General Counsel's approach, which was upheld in the court litigation of *Scott* v. *Rothmen* [41 LC ¶ 16,535], has, in effect, sought to maintain privileges of employees and labor organizations until such time as the Board would indicate that such privileges were negated by the enactment of Section 8(b)(7).

It should be noted further that the 8(b)(7)—8(a)(5) cases, considered as an integrated fact situation, have not been deferred or suspended. Rather, the basic dispute, i.e., the employer's refusal to recognize the union, has been litigated before the Board. What has not yet been litigated in these situations is the question of whether a union is privileged to picket in protest of the employer's illegal refusal to bargain.

In some of the recent decisions of the Board, there is language in the majority opinions which suggests that an 8(b)(7) and 8(a)(5) violation can exist concurrently. *Charlton Press*, 130 NLRB No. 90 [1961 CCH NLRB Decisions ¶ 9717]. However, the issue is still not free from doubt, particularly since a motion for reconsideration has been filed in that case.

When the Board has finally spoken in the *Charlton Press* case, the procedure the General Counsel should adopt may well become clear. However, in view of its highly unsettling effect on labor relations generally, and its impact on settled law prior to

enactment of 8(b)(7), proceeding on 8(b)(7) charges in the situations discussed above was not believed warranted absent some indication from the Board that concurrent processing of 8(b)(7) and 8(a)(5) charges was contemplated and required by the new section.

Nature, Function and Administrative Operation of Office of Appeals

Under Section 102.19 of the Board's Rules and Regulations, provision is made for an appeal to the General Counsel from the refusal by a Regional Director to issue complaint. Whenever such refusal occurs, the Director so advises the charging party in writing, briefly stating the reason for his action, informing the party of his right to appeal and the date by which the appeal must be filed, and noting that additional time will be granted on a showing of necessity. Copies of the above letter are sent to all parties concerned. It should be emphasized at this point that the standard operating procedure applicable to all regional offices requires that the charging party be fully apprised of the reasons for the refusal to issue complaint prior to the ending of the letter. This procedure is designed to afford the charging party the opportunity to discuss the issues and offer further evidence prior to formal action, and to enable him to prepare his appeal intelligently in the event the regional office adheres to its position in the matter.

When an appeal is filed it is referred to the Office of Appeals which acknowledges its receipt, sending copies of the acknowledgement to all other parties and attorneys of record. The Regional Director with whom the Rules require a filing of a copy of the appeal, then forwards the entire regional office file to the Office of Appeals together with his comments concerning the position taken by the charging party in his request for review. While the file and comments are usually forwarded within 3 days of the receipt of the copy of the appeal, the Regional

Director may in his discretion defer submission pending further investigation if such action is deemed necessary to resolve issues raised by the charging party in his appeal. Moreover, if, upon further investigation, evidence is disclosed which, in the judgment of the Director, supports an unfair labor practice finding, he has the authority to withdraw his dismissal letter and issue complaint. In this event, all parties concerned are advised by the Office of Appeals that it is closing its file in the matter.

Upon receipt by the Office of Appeals of the regional office file and comments, the entire matter, including any statement which a respondent may care to submit, is assigned to a staff attorney for study. The latter, after examining the file and all relevant documents in detail, prepares a memorandum which contains a statement of the facts, and analysis of the factual and legal issues involved, and a recommendation for disposition of the appeal. The matter is then reviewed by a supervisor. Effective supervision is guaranteed by not assigning more than three attorneys to any supervisor. Any disagreement between the attorney and the supervisor is noted in the memorandum.

In due course the case is scheduled for consideration by the Appeals Committee, consisting of the Director and Associate Director of the Office of Appeals and a third top staff member, with a combined experience with the Agency totalling over 40 years. No staff personnel participating in the determination of an appeal have had any connection with the case at any earlier stage.

The Appeals Committee meets twice each week to consider a case agenda prepared sufficiently in advance to afford Committee members the opportunity to read the memoranda and familiarize themselves with the cases. Each case on the agenda is considered in detail with both the attorney and supervisor freely participating in the discussion and expressing their views. If, in the judgment of the members of the Committee, the file does not contain sufficient information to permit a resolution of the

issues in dispute, the case is remanded to the regional office with instructions to conduct such further investigation as is necessary to obtain the information in question.

If a party or his attorney in a given case desires an opportunity to present his views in person, a meeting is arranged for this purpose with equal opportunity being accorded to the other side. In cases where such meetings take place, a file memorandum is prepared by the responsible attorney setting forth the views expressed by the various parties concerned, and, in situations where it is deemed appropriate, a cpoy of this memorandum is forwarded to the regional office for comment.

On the basis of the original case analysis memorandum, the deliberations of the Appeals Committee, and upon any oral presentation made by the parties, the Committee makes its decision. This decision is reduced to the form of a "General Counsel's Minute" which covers the relevant facts and the reasons for the decision. This minute is cleared, in the usual case, through the Special Assistant to the General Counsel. When a case presents a novel or especially difficult problem, involves a policy issue, or is one in which there is disagreement among top-level staff personnel, the case is discussed in detail with the General Counsel who, in effect, reconvenes the Appeals Committee and participates in its further deliberations.

All parties concerned and their attorneys are advised of the decision by letter. While this ordinarily closes the matter, requests for reconsideration are entertained. In such instances, the evidence in its entirety is carefully reviewed in the light of reasons advanced by the charging party in support of his request and all interested parties are notified of the disposition of the matter.

From what has been said above, it is clear that every effort has been made to provide "administrative due process" in the handling of appeals cases. I want to assure the Committee, however, that this Office is keenly aware of its continuing responsi-

bilities in this area. To this end, a study is currently under way to determine whether any improvements can be made in our case handling processes. In this connection, I have recently taken the opportunity to reemphasize to all Regional Directors and Officers-in-Charge the necessity of making certain not only that a charging party is fully informed concerning the region's position prior to the issuance of the formal dismissal letter, but that if such information is conveyed orally the charging party fully understands the basis for dismissal, and that if the Regional Director has any doubt that such understanding exists, the reasons for dismissal must be expressed in the dismissal letter itself.

Office of NLRB General Counsel

At this point, I would like to address myself to the suggestion, which witnesses have made to the Committee, that all cases involving factual issues should be sent to hearing before a trial examiner rather than dismissed administratively. Since the vast majority of cases do present factual issues of one kind or another, and only some of these involve credibility, as discussed in Appendix C [not published], adoption of the suggestion would have required in fiscal 1959, for example, the issuance of complaint in almost 10,000 additional cases. The serious impact that such a course would have had on the Agency's already heavy backlog, with only 2,100 complaints issued during that year, is obvious. Moreover, I am at a loss to understand the justification for adopting a different standard for the Board's operations from that which is applicable to other governmental agencies, including district attorneys, whose day-to-day operations require the making of credibility resolutions in deciding whether to proceed in a given case. In my view, not only would such a procedure impose an undue and unreasonable burden of litigation on respondents, employers and unions alike, merely because someone, uninhibited even by the deterring costs confronting a private litigant, sees fit to file a charge however lacking in merit, it would also cripple the processes of the Agency by producing untold delay, with its consequent effect on the parties, in a field where the very proponents of this procedure recognize that time is peculiarly of the essence. I cannot believe, for example, that those who espouse the indiscriminate issuance of complaints have given sufficient thought to the effect such course would have in preventing a prompt resolution of questions concerning representation through the filing of blocking charges. More specifically, the indiscriminate issuance of meritless complaints would effectively prevent the holding of representation elections with the necessary consequence of leaving unsettled industrial relations in very broad areas of our economy. In fact, such indiscriminate issuance of complaints could effectively nullify the representation machinery of the Act and negate the legisaltive policy of fostering industrial peace.

The suggestion has also been made that the relatively small number of cases in which the Regional Directors' refusals to issue complaint have been reversed on appeal supports the contention that the Office of Appeals is "rubber-stamping" the Directors' action. The Committee should bear in mind in this connection that the percentage of reversals (on the average about (6%) will necessarily be small since all of the cases on appeal have been subjected to careful evaluation at the Regional Office level by top-echelon field personnel, the great majority of whom have had long years of experience and proven integrity and ability, [which] provides a firm guarantee that the decision in every appeals case is made on the basis of a careful *de novo* evaluation and review of the evidence disclosed by the field investigation. In the final analysis it is the character and caliber of the men who perform the function more than the structure that determine its quality and fairness, which constitute at once the objective and foundation of due process.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

NATIONAL LABOR RELATIONS BOARD AND
PETER G. NASH, GENERAL COUNSEL, PETITIONERS

v.

SEARS, ROEBUCK AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1233

NATIONAL LABOR RELATIONS BOARD AND PETER G. NASH, GENERAL COUNSEL, PETITIONERS

v.

SEARS, ROEBUCK AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

1. The principal contention of respondent and the *amici*[1] involves the following syllogistic reasoning:

a. The General Counsel is an "agency" under the Freedom of Information Act.

b. The advice and appeals memoranda are the final determinations made by such agency in deciding whether to institute cases.

c. The advice and appeals memoranda are therefore "final opinions * * * made in the adjudication of cases."

[1]The *amici* are the Freedom of Information Clearinghouse ("Clearinghouse"), the Chamber of Commerce of the United States, the American Civil Liberties Union and the Consumers Union of United States, Inc. The latter two organizations have filed a joint brief.

Even accepting the first two premises, the conclusion does not follow.[2]

As shown in our opening brief, the General Counsel does not adjudicate any cases under the National Labor Relations Act. His sole function is that of a prosecutor deciding whether to issue a complaint when an unfair labor charge has been filed, and, if a complaint is issued, prosecuting the case before the Board. Even if the advice and appeals memoranda are viewed as the culmination of the General Counsel's investigation and consideration of a particular case, they are not "final opinions" made in the "adjudication" of cases.

Implicit in the requirement that an agency make public "final opinions * * * made in the adjudication of cases" is that the opinions be those of the agency that is doing the adjudication. In other words, what Congress intended in Section 552(a)(2)(A) of the Freedom of Information Act was to require agencies to make public the final opinions rendered in their adjudicatory processes. Nothing in the language or the legislative history of this provision, however, suggests that Congress intended to make public rulings of a subordinate component of an adjudicatory agency where, although that component itself may be an "agency" under the Freedom of Information Act, the component is not doing the adjudicating.

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[2]The fact that an administrative body may be an "agency" for the purpose of the Freedom of Information Act does not mean that it performs adjudicative functions. See, *e.g.*, *Soucie* v. *David*, 448 F.2d 1067, 1073 (C.A.D.C.) (Office of Science and Technology); *Nichols* v. *United States*, 325 F. Supp. 130, 138 (D. Kan.), affirmed, 460 F.2d 671 (C.A. 10), certiorari denied, 409 U.S. 966 (National Archives and Records Service). Cf. *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare*, 504 F.2d 238 (C.A.D.C.) (Initial Review Groups within the National Institute of Mental Health).

The advice and appeals memoranda of the General Counsel are no more "final opinions * * * made in the adjudication of cases" than would be a memorandum from the Assistant Attorney General in charge of the Criminal Division in the Department of Justice to a United States Attorney, written in response to the latter's request for authorization to institute a criminal proceeding, which authorizes the prosecution, explains the reasons for the authorization, discusses and evaluates the evidence, and analyzes the legal theories upon which the case should rest. However one may define the types of actions by the National Labor Relations Board that constitute "adjudication" under the Freedom of Information Act, the term does not include the determination whether there is probable cause to believe that the National Labor Relations Act has been violated, which the General Counsel makes when he authorizes the Regional Director to issue, or not issue, a complaint.[3]

As we explained in our opening brief (pp. 5-8), the advice and appeals memoranda represent the basic advice given by the General Counsel to the staff attorneys with respect to the initiation and conduct of litigation. They reflect the mental process by which the General Counsel and his staff attorneys have determined what further action should be taken in a case—either the dismissal of the charge or the issuance of a complaint, and, if the latter, the

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[3]Sears points out (Br. 19-20) that the Administrative Procedure Act defines "adjudication" as "agency process for the formulation of an order" (5 U.S.C. 551(7)) and "order" as "the whole or a part of a final disposition * * * of an agency in a matter other than rule making but including licensing" (5 U.S.C. 551(6)). The decision of the General Counsel on whether to institute unfair labor practice proceedings before the Board is not an "adjudication" under that Act, since his advice to the Regional Director does not constitute an "order" within the usual meaning of that term.

manner in which it should be prosecuted (App. 71). These documents are thus analogous to the "work product" of a lawyer with regard to possible litigation, which, because of the strong public interest in protecting its confidentiality, is immune from discovery except in exceptional circumstances. See *Hickman* v. *Taylor*, 329 U.S. 495.[4]

In the circumstances, to require the General Counsel to disclose advice or appeals memoranda to "any person" (see 5 U.S.C. 552(a)(3)), including the respondent,[5] would injure the consultative functions of government just as surely as would requiring disclosure of deliberations in an adjudicative agency. Clearinghouse (Br. 26-27) takes too narrow a view in contending that memoranda may harm the consultative functions of government only where dis-

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[4]Contrary to Sears' contention (Br. 22-23, n. 28), the work product privilege applies to government attorneys, no less than to private attorneys. See *J. H. Rutter-Rex Manufacturing Co., Inc.* v. *National Labor Relations Board*, 473 F.2d 223, 234 (C.A. 5), certiorari denied, 414 U.S. 822; *Thill Securities Corp.* v. *New York Stock Exchange*, 57 F.R.D. 133, 138 (E.D. Wis.).

Sears incorrectly states (Br. 3, n. 3; 16, n. 21) that the General Counsel conceded below that advice and appeals memoranda contain no "sensitive" material. In his reply brief in the court of appeals (pp. 4-5), the General Counsel stated that, "albeit the record does not contain examples of Advice and Appeals memoranda discussing such matters [trial tactics and settlement agreements], we submit that the surrounding circumstances of this case demonstrate that the class of documents sought is used to advise the staffs on such matters." Moreover, contrary to Sears' contention (Br. 10, 15), the memoranda in the record do disclose the evidence in the cases, the General Counsel's legal theories, and possible defenses (A. 83-85, 86-87, 185-187, 188-189, 194-198, 205-209, 210-212).

[5]Sears' emphasis on its interest as a charging party obscures this point. If the memoranda are to be made available under the Freedom of Information Act to a charging party, they must also be made available to charged parties, who will be respondents in an adversary proceeding if a complaint issues on the charges. This possibility exists even where a memorandum advises the Regional Director not to issue a complaint, for that decision may be reversed on appeal — as happened in this case.

closure is likely to cause subordinates to fear undue public criticism. Candid communication is equally threatened when government attorneys have reason to fear that disclosure to the respondent of the internal memoranda will harm the prosecution of the case.

Moreover, contrary to respondent's contention (Br. 16), the advice and appeals memoranda are not final and conclusive determinations by the General Counsel with respect to the precise way in which the litigation should be conducted, so that the role of the Regional Director in implementing them is merely "ministerial." When the Division of Advice or the Office of Appeals sends the Regional Director a memorandum recommending that a complaint issue, it may suggest a single theory on which to proceed or alternative theories, with the choice of theories to depend on what further facts may be developed in a subsequent investigation or what defenses the respondent raises. Even where only one theory is suggested, the Regional Director may find it necessary to amend the complaint and change the prosecution theory in the light of the evidence developed at the hearing or the respondent's defenses. Where the Office of Appeals overrules the Regional Director's decision not to issue a complaint and directs that the case go forward, attorneys from the Office of Appeals may go to the regional office to assist in trying the case, and, in this joint effort, the legal theory may undergo further refinement.

The fact that the General Counsel has voluntarily made public memoranda in closed cases (Pet. Br. 10, n. 12) and published excerpts from memoranda in significant cases in his Quarterly Report (Pet. Br. 46, n. 34) does not weaken the importance of preserving the confidentiality of those documents in pending cases, in order to protect the government's litigation strategy and decisions. In signing the

Freedom of Information Act, President Johnson encouraged government officials to make information available to the fullest possible extent. 2 *Weekly Compilation of Presidential Documents* 895 (July 11, 1966). The limited disclosure the General Counsel will make furthers this policy without jeopardizing the important government interest in maintaining the confidentiality of internal documents relating to matters currently in litigation.

2. Sears (Br. 20-21) and Clearinghouse (Br. 33-35) argue that advice and appeals memoranda are "statements of policy and interpretations which have been adopted by the agency" within the meaning of Section 552(a)(2)(B) of the FOI Act. The General Counsel, however, neither "adopts" advice and appeals memoranda as his official "policy" or "interpretation," nor uses them as a controlling body of precedent. They are not "adopted" as policy merely because a subject matter file of memoranda has been kept in the Division of Advice for convenience in staff research.[6] Finally, the contention that advice and appeals memoranda represent a body of "adopted" agency policy is belied by Sears' complaint (Br. 26-27) that these supposedly precedential decisions are memorialized in an unusable and "incomplete" form, failing in many instances to state the "significant facts upon which the decision hinged."

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[6]Sears' contention (Br. 8, n. 10) that the General Counsel "represented to the lower courts that the Appeals decisions—General Counsel's Minutes — have been indexed by subject matter since August, 1971" is erroneous. Our brief in the court of appeals (p. 29, n. 23) only noted that the General Counsel was "preparing an index for appeals letters and memoranda." This involved, as a first stage, developing a system of index categories, a task that has not yet been completed. Accordingly, as of this time, appeals letters and memoranda are still not filed by subject matter. The preparation of an appeals index, which we believe is not legally required, has been delayed because other projects have taken priority — *e.g.*, the preparation of an index for Regional Directors' decisions in representation cases (see *Automobile Club of Missouri* v. *National Labor Relations Board*, 84 LRRM 2423 (D. D.C.), affirmed, 495 F.2d 1074 (C.A.D.C.)).

3. Section 552(a)(2)(C) of the FOI Act requires disclosure of "administrative staff manuals and instructions to staff that affect a member of the public." Clearinghouse contends (Br. 36-37) that this provision covers advice memoranda, because the Senate Report (at p. 2), in explaining the insertion of the limiting term "administrative," stated that the limitation would protect the confidentiality of "instructions to Government personnel prosecuting violations of law *in court*" (emphasis added). This statement, Clearinghouse insists, "leaves no alternative" to the holding that the only enforcement instructions Congress intended to keep confidential were those relating to court enforcement and that those relating to administrative enforcement must be made public.

None of the cases interpreting Subsection (a)(2)(C) has made such a distincition, and with good reason.[7] The policy justification for maintaining the confidentiality of law enforcement instructions is equally applicable to both categories of enforcement. In Subsection (a)(2)(C) Congress intended to protect documents pertaining to all law enforcement matters, whether they be before the court or the agency.

4. In our main brief, we argued (pp. 29-36) that advice and appeals memoranda are excepted from disclosure by Exemption 7 which, prior to its amendment, discussed *infra*, excepted from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Sears contends (Br. 23) that Exemption 7 is inapplicable because

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[7]See *Stokes* v. *Brennan*, 476 F.2d 699 (C.A. 5); *Hawkes* v. *Internal Revenue Service*, 467 F.2d 787 (C.A. 6); and *City of Concord* v. *Ambrose*, 333 F. Supp. 958 (N.D. Cal.).

"[a]t issue here are not investigatory files but, instead, a system of law contained in subject-matter files and indices retained in Washington and used for a non-investigatory purpose — the resolution of related future cases." Advice and appeals memoranda, however, analyze the results of the investigation of the unfair labor practice charge, and, if it is determined that the charge warrants prosecution, they contain the "blue prints" for that prosecution. Accordingly, those memoranda are properly a part of "investigatory files compiled for law enforcement purposes."

Exemption 7 is not rendered inapplicable to advice and appeals memoranda by the recent revision of that exemption.[8] The new Exemption 7 reads as follows:

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel * * *. [Pub. L. No. 93-502, Sec. 2(b), 88 Stat. 1563-1564.]

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[8]The FOI Act was amended by Pub. L. No. 93-502, 88 Stat. 1561, November 21, 1974. The amendments take effect on February 19, 1975 (90 days after the date on which Congress overrode the President's veto).

The purpose of this revision, as explained by its principal sponsor, Senator Hart, and others who supported it, was to change the construction of Exemption 7 in *Weisberg* v. U.S. *Department of Justice*, 489 F.2d 1195 (C.A.D.C.), certiorari denied, 416 U.S. 993, and to return to what they contended was the intent of Congress in originally enacting Exemption 7. See 120 Cong. Rec. S9329-S9337, *passim* (daily ed., May 30, 1974). In *Weisberg* the court of appeals held that all the government had to show to prevail under Exemption 7 was that the file (1) was "investigatory" and (2) was compiled for law enforcement purposes. Congress intended by this amendment to eliminate any blanket exemption for investigatory *files* and, instead, to require that *records* in those files, before qualifying for the exemption, satisfy the purposes for which the exemption was created. Thus, Senator Hart observed (*id.* at S9330):

> The purpose of the Freedom of Information Act is to provide maximum public access while at the same time recognizing valid governmental and individual interests in confidentiality. This amendment balances those two interests and is critical to a free and open society. This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago [when *Weisberg* was decided], the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information.

See also the colloquy between Senator Hart and Senator Kennedy, *id.* at S9336.

As shown in our main brief (pp. 31-32), advice and appeals memoranda, and their underlying documentation gathered in investigations of unfair labor practices, come within Exemption 7 "in light of" its "language and purposes." The disclosure of such memoranda would impair the purposes of the exemption, which the Second Circuit described in *Frankel* v. *Securities and Exchange Commission*, 460 F.2d 813, 817, certiorari denied, 409 U.S. 889, as the prevention of "the premature disclosure of the results of an investigation so that the Government can present its strongest case in court" and the protection of the confidentiality of "the procedures by which the agency conducted its investigation and by which it has obtained information." The inclusion of subparagraphs (A), (D), and (E), *supra*, in the amended Exemption 7 shows that it was intended to afford the same protection.

For these reasons as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

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Petitioners,

v.

SEARS, ROEBUCK AND COMPANY,

Respondent.

On Writ of Certiorari To The United States Court of Appeals for The District of Columbia Circuit

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BRIEF FOR *AMICUS CURIAE* FREEDOM OF INFORMATION CLEARINGHOUSE

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4 J. Moore and J. Lucas, Federal Practice (2d ed. 1974) 25

Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047 (1973) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1233

NATIONAL LABOR RELATIONS BOARD AND PETER G. NASH, GENERAL COUNSEL,

Petitioners,

v.

SEARS, ROEBUCK AND COMPANY,

Respondent.

On Writ of Certiorari To The United States Court of Appeals for The District of Columbia Circuit

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BRIEF FOR *AMICUS CURIAE* FREEDOM OF INFORMATION CLEARINGHOUSE

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Freedom of Information Clearinghouse is representing the interests of those persons who, regardless of any commercial interest, seek access to the full spectrum of information available from the government. While we believe that a democracy can function properly only when there is an open government and an informed electorate, we recognize that even

in a democracy certain information must at times be kept confidential for the benefit of the country. Too much governmental secrecy, however, benefits neither the people nor the government but breeds mistrust and impedes efficient government operation.

The Freedom of Information Clearinghouse was established in 1972 as part of the Center for Study of Responsive Law, which is a publicly supported foundation. The Clearinghouse was created in order to increase public access to government controlled information. It collects and disseminates relevant information by mail and through speeches, conferences, articles, and testimony before Congressional committees concerning the public's rights of access. It is one of the few places to which persons without a significant financial stake in securing information can turn to obtain experienced legal assistance. As a consequence, 22 of the 95 Freedom of Information Act (FOIA) cases in litigation on September 1, 1974 were being handled by a Clearinghouse attorney. [1]

The Clearinghouse has chosen to file an *amicus curiae* brief in this case because it believes that this Court's decision may have an impact reaching far beyond this particular case. We have discussed the parameters of exemption

[1] *See* Department of Justice, A List Of Suits Filed Under 5 U.S.C. 552 That Are Being Handled By The Civil Division As Of September 1, 1974. The Clearinghouse also filed an *amicus curiae* brief in one other case then pending. Congress has recently recognized that "often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information," and has proposed legislation allowing awards of attorneys fees to persons who substantially prevail in Information suits against the Government. S. Rep. No. 93-854, 93d Cong., 2d Sess. 17 (1974). If finally enacted, we anticipate that the Clearinghouse's percentage of the country's litigated cases will decline.

5 of the Freedom of Information Act, 5 U.S.C. §552(b)(5) (1970), in depth so that the Court will have a full picture of the underlying issues and, whatever the outcome, it will not inadvertently cripple either the government's interest in protecting certain deliberations or the public's interest in securing all available information on the workings of its government.

STATEMENT

On April 6, 1971, Sears, Roebuck and Co. (Sears) filed a charge of alleged unfair labor practices with the Seattle Regional Office of the National Labor Relations Board (NLRB) (Pet. Br. 8).[2] The case was submitted to the Division of Advice (then the Advice Branch) in accordance with section 101.8 of the NLRB's Statements of Procedure, 29 C.F.R. §101.8, which provides that in cases involving novel and complex legal issues "the regional director . . . *must* submit the cases for advice from the general counsel" (emphasis added). Apparently the Division of Advice decided the issues unfavorably to Sears, since the regional director notified Sears that no complaint would be filed (A. 12-13, 21-23), and the General Counsel concedes that "the Regional Director rarely, *if ever*, disregards advice on legal issues" (Pet. Br. 6). Unless administratively appealed, such initial decisions are final, and a charging party's access to Board proceedings are cut off (A. 198-200).

[2] "Pet. Br." refers to the Brief for the Petitioners in this Court. "Pet. App." refers to the appendix to the petition, "Op. App." to the appendix to the respondent's brief in opposition to the petition, and "A" to the separate appendix printed pursuant to Rule 36.

At this point, Sears requested copies of: (1) the advice memorandum in its case; (2) advice and appeals memoranda dealing with similar issues within the preceding five years; and (3) an index of the advice and appeals memoranda. The General Counsel denied Sears' requests, claiming that exemptions 5[3] and 7[4] of the Freedom of Information Act gave him a right to keep this information secret (A. 19). In August, 1971, Sears filed suit under the Freedom of Information Act, 5 U.S.C. §552, in the United States District Court for the District of Columbia seeking access to all three categories of requested documents.

Meanwhile, Sears had appealed the initial decision to the General Counsel and made both written and oral presentations. As a result, the Acting General Counsel reversed the initial decision, an extremely rare occurrence when his Office has previously issued an advice memorandum, and ordered the issuance of a Board complaint, which was filed on September 1, 1971 (A. 32-37). Finally, in February, 1972, six months after the filing of the FOIA complaint and five months after the filing of the unfair labor practices complaint, the General Counsel provided Sears with "sanitized" copies of advice and appeals memoranda from all closed cases, and made available the General Counsel's index to the advice memoranda in closed cases. The General Counsel made it clear that he was producing these documents only as a matter of grace, and that he

[3] 5 U.S.C. §552(b)(5): "This section does not apply to matters that are . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;"

[4] 5 U.S.C. §552(b)(7): "This section does not apply to matters that are . . . (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;"

did not consider himself to be obligated to furnish them to others. He also refused to give Sears copies of any documents which would explain the meaning of such phrases as the "circumstances of the case" (A. 169; A. 101; A. 107; Pet. App. C, p. 5a).

In the district court the General Counsel claimed that the advice and appeals memoranda were internal communications covered by exemption 5, and that the materials incorporated therein by reference were exempted from compelled disclosure by both exemptions 5 and 7. On August 10, 1972, the district court granted Sears' motion for summary judgment and denied the General Counsel's similar motion, holding that advice memoranda were instructions to staff and appeals memoranda were final agency opinions which must be disclosed pursuant to 5 U.S.C. §552(a)(2)(A) and (C) (Pet. App. C, p. 9a), and that in any event neither type of memoranda was within the scope of exemption 5 (*Id.*). The district court also ordered disclosure of documents expressly incorporated by reference, and of non-exempt documents indirectly incorporated by use of such phrases as the "circumstances of the cases," although the court also gave the General Counsel the alternative of producing explanatory material other than the incorporated documents. In addition, the Court allowed deletions of the names of affiants and settlement suggestions, if any, contained in the memoranda. Finally, the district court ordered the General Counsel to make available the indices required by 5 U.S.C. §552(a)(2) for advice and appeals memoranda compiled after July 4, 1967 (Pet. App. C, pp. 9a-10a). By this time the General Counsel had already made available the index for advice memoranda in closed cases and was in the process of compiling

one for appeals memoranda, albeit beginning only with August, 1971 (G.C. Br. D.C. 29 n.23).[5]

In the court of appeals the General Counsel again claimed the applicability of exception 5 to the advice and appeals memoranda, and exemptions 5 and 7 to the backup materials. But this time he also claimed that the request for backup materials incorporated by reference was not a request for "identifiable records" within the meaning of 5 U.S.C. §552(a)(3) (G.C. Br. D.C. 31). Nonetheless, the court of appeals affirmed on the basis of the district court's decision (Pet. App. A, p. 1a). A petition for rehearing was denied without opinion (Pet. App. B, p. 3a).

In his petition for a writ of certiorari, the General Counsel once again claimed that advice and appeals memoranda fell within exemption 5, but he also alleged for the first time since his original letter of denial (A. 19) that they, as well as the backup materials, were within the scope of exemption 7. Similarly, while he dropped his claim that some of the documents were not "identifiable," he raised for the first time the claim that all of the documents sought were covered by exemption 2: "matters . . . related solely to the internal personnel rules and practices of an agency."

SUMMARY OF ARGUMENT

In urging affirmance of the decisions below, the Clearinghouse has focused on the General Counsel's withholding of advice and appeals memoranda, leaving largely to the parties the important, but tangential, issues concerning indexing requirements and disclosure of documents incorporated by reference.

[5] "G.C. Br. D.C." refers to the principal Brief of the Appellant (General Counsel) in the Court of Appeals for the District of Columbia Circuit.

The special features of the Freedom of Information Act include requirements for mandatory disclosure of non-exempt information, permissive disclosure of exempt information, exhaustion of administrative remedies by a requesting party, and *de novo* court review with the burden of proof on the agency (*see* 5 U.S.C. §552(a)(3)). Implicit in the Act is a requirement that by the time a case reaches the district court, the agency will have claimed all of its defenses, and that the failure to do so will act as a waiver of non-claimed exemptions, at least where, as here, no law prohibits disclosure. The General Counsel failed to claim the applicability to advice and appeals memoranda of either 5 U.S.C. §552(b)(2) or 5 U.S.C. §552(b)(7) until he reached this Court. Since in the courts below, he claimed (b)(7) only as to the documents incorporated by reference, and he never claimed (b)(2) as to *any* of the documents, he should not now be allowed to rely upon those waivable defenses.

In attempting to justify secrecy during the pendency of an NLRB proceeding, the General Counsel has primarily relied upon exemption 5 of the Freedom of Information Act, which allows withholding of "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5). Since almost any document produced within the executive branch may be considered an inter- or intra-agency memoranda, a broad reading of the exemption would engulf the Act's liberal disclosure requirements and would make most of the other exemptions superfluous. To prevent such an occurrence, courts have recognized that the "available by law" exception limits the exemption to those documents which have been held not to be discoverable because of the doctrine of executive privilege. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 85-86 (1973). Yet difficulties remain in applying the "rough analogies" of the discovery

rules to the Freedom of Information Act because Congress has determined that the need of an individual requester for the disputed records is irrelevant under this exemption. *Id.* at 86. Courts have thus had to consider the purposes behind both the Act and the exemption in an effort to insure the widest possible disclosure of useful information to the public without causing serious injury to the consultative functions of government which executive privilege is intended to protect.

We believe that Congress intended the focus to be on the proper scope of executive privilege in evaluating claims under the fifth exemption. Accordingly we deal first with the FOIA's legislative history in an attempt to discern Congress' understanding of the scope of the governmental privilege, and then with the discovery cases which have actually interpreted and applied that privilege. This analysis demonstrates that the privilege embodied in exemption 5 does not generally protect factual information and extends only to two types of advice: (1) recommendations, usually at a high level, regarding the making of policy (as opposed to a mere application of policy) and (2) legal opinions in the nature of a lawyer's work product. Moreover, agency opinions, policy statements, and instructions to staff do not fall within the scope of the privilege and, hence, are generally disclosable. Finally, in the third and fourth subsections, we discuss the leading cases which have interpreted exemption 5, and conclude that advice and appeals memoranda cannot be withheld under Congressionally mandated criteria.

ARGUMENT

I. NEITHER THE EXEMPTION 2 NOR THE EXEMPTION 7 ISSUES RAISED BY THE GENERAL COUNSEL ARE APPROPRIATE FOR SUPREME COURT CONSIDERATION IN VIEW OF THE SPECIAL CIRCUMSTANCES OF THIS CASE.

Under the statutory scheme created by Congress for review of Freedom of Information Act requests, an agency should not be permitted to raise a new defense for the first time at the appellate court level — certainly not at the Supreme Court level — as the General Counsel has sought to do with regard to his exemption 2 claim. Similarly, this Court should refuse to rule upon the General Counsel's exemption 7 defense because it was not raised in the courts below as to the advice and appeals memoranda, although it was argued regarding documents incorporated therein by reference.[6]

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[6] We also point out that proposed amendments to the FOIA, including exemption 7, are pending in Congress. *See* Conference Report, H. Rep. No. 93-1380, 93d Cong., 2d Sess. (1974). If enacted, the government's claim under exemption 7 will no longer be a question worthy of certiorari even as to the material incorporated by reference because Congress' specifically expressed intent in amending exemption 7 is to "disapprov[e]" (H. Rep. No. 93-1380, *supra*, at 2) the very cases relied upon by the General Counsel in his Supreme Court brief. *Compare* Pet. Br. 32 *with* 120 Cong. Rec. S 9336 (daily ed., May 30, 1974). In doing so, the House-Senate Conference Committee explicitly stated:

> Nor is this exemption [7] intended to include records falling within the scope of subsection 552(a)(2) of the Freedom of Information law, such as administrative staff manuals and instructions to staff that affect a member of the public. [H. Rep. No. 93-1380, *supra*, at 12-13 (1974)]

(continued)

In June of 1971, Sears requested access to the advice and appeals memoranda which are the subject of this litigation. Both its initial request and its administrative appeal were denied on the bases of exemptions 5 and 7 of the Freedom of Information Act (A. 19, 24-28, 29-31; Pet. Br. 10). In the district court, exemptions 5 and 7 were the only defenses raised, and the latter exemption was argued only as to certain backup materials. Both issues were decided adversely to the agency.

In the court of appeals, the General Counsel again relied upon exemptions 5 and 7, but he also attempted to raise for the first time the defense that the documents incorporated by reference into the advice and appeals memoranda, and ordered to be disclosed by the district court, were not "identifiable records" within the meaning of section 552(a)(3) (G.C. Br. D.C. 31). Since the court of appeals affirmed the judgment on the basis of the opinion of the district court (Pet. App. A, pp. 1a-2a), which had not considered the identifiable records question because it had not been argued, it appears that the court of appeals refused to consider the belatedly raised identifiable records issue. In any event, the General Counsel has abandoned that attempt to rationalize his withholding, but now, in this Court, he seeks for the first time to raise two new defenses. He rather apologetically states that another "review of the case" (Pet. Br. 36) indicates that advice and

[6] (continued) While the President has vetoed the proposed amendments, neither his veto message nor the alternative language which he has transmitted to the Congress would change the proposed amendments to exemption 7 as they are relevant to this case. The Congress has yet to vote on a possible veto override, and the President has in any event urged the Congress to reenact the new amendments during this Session with his suggested changes to exemption one, and the provisions dealing with costs and time limits in responding to requests.

appeals memoranda are "related *solely* to the internal *personnel* rules and practices of an agency" (5 U.S.C. §552(b)(2) (emphasis added)).[7] Furthermore, he claims that the advice and appeals memoranda are protected by the investigatory files exemption (5 U.S.C. §552(b)(7)), without even acknowledging that the issue was never raised below, where he had asserted exemption 7's applicability only as to backup documents incorporated by reference.[8]

The regulations of most Federal agencies, require a requester to make both an initial and appellate request before going to court. *E.g.*, Justice, 28 C.F.R. §16.7; Labor, 29 C.F.R. §70.50; Renegotiation Board, 32 C.F.R. §1480. 7(e). *See* 5 U.S.C. §552(a)(3); *Aviation Consumer Action Project v. CAB*, 370 F. Supp. 945 (D.D.C. 1972). The requirement that a requester exhaust his administrative remedies is intended to give the agency an opportunity to fully consider a request and to focus the legal issues. The administrative procedure is, however, a two way street. Just as a requester cannot expand the scope of his request after going to court, an agency should not be allowed to use its administrative procedure as a device for exhausting the requester by claiming one set of exemptions at the administrative level, only to change its defenses at each successive level of court review.

[7] The General Counsel did acknowledge that "some" lower courts – citing the Fifth and Sixth Circuits, as well as the district court for the District of Columbia (Pet. Br. 39) – have held that the Senate Report correctly states that exemption 2 protects only documents concerned solely with an agency's relations with its employees. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965). *Contra* H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

[8] Also noteworthy is the fact that the General Counsel argues in this Court that the "except" clause to exemption 7 was not intended to allow a plaintiff access to documents which would be available in discovery (Pet. Br. 34), while he argued exactly the opposite view before the Court of Appeals (G.C. Br. D.C. 33). *See* Petition For A Writ of Certiorari 13.

This conclusion is supported by the statutory scheme since the exemptions from mandatory disclosure are permissive only,[9] and may be waived, unless there is an executive order (*see* exemption 1) or a statute (*see* exemption 3) which *prohibits* disclosure.[10] Allowing an agency to claim one exemption at the administrative level and to argue additional exemptions at the district court level will dilute the administrative review process, and spawn litigation by encouraging a superficial review process. The requester, who does not know the actual contents of a document, may rightly realize that the exemption claimed is inapplicable and thus commence litigation, even though he may not have gone to court had the agency taken the time to properly review the requested documents, claimed all the exemptions which were really applicable, and explained the justification for applying them.

In any event, there is no justification for allowing an agency to raise new, waivable, issues on appeal. To do so is inconsistent with the statutory mandate and would defeat the Congressional policy underlying the Act. *See Duignan v.*

[9] *E.g.*, Sears, Roebuck and Co. v. GSA, Civ. No. 2146-73, slip op. 4 (D.D.C., Sept. 6, 1974). *See, e.g.*, S. Rep. No. 93-854, 93d Cong., 2d Sess. 6 (1974); S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965); 112 Cong. Rec. 13007 (1966); K. Davis, *Administrative Law Treatise* §3A.5 (Supp. 1970).

[10] In accordance with the suggestion in the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 2-3 (1967), many agencies have by regulation expressly adopted the position that, notwithstanding applicability of an FOIA exemption, records must be disclosed when to do so is in the public interest. *E.g.*, State, 22 C.F.R. §6.5(b); HUD, 24 C.F.R. §15.21; Labor, 29 C.F.R. §70.22(b); Interior, 43 C.F.R. §22; HEW, 45 C.F.R. §5.70; DOT, 49 C.F.R. §7.51. At least one court of appeals has approvingly cited the Labor Department's regulation curbing the scope of the FOIA exemptions. *Secretary of Labor v. Farino*, 490 F.2d 885, 893 (7th Cir. 1973).

United States, 274 U.S. 195, 200 (1927); *Shokuwan Shimabukuro v. Higeyoshi*, 78 U.S. App. D.C. 271, 273, 140 F.2d 13, 15 (1944); *Stanley v. United States*, 245 F.2d 427, 435 (6th Cir. 1957); *see also Ladrey v. Commission On Licensure To Practice The Healing Art*, 104 U.S. App. D.C. 239, 242, 261 F.2d 68, 71 (en banc), *cert. denied*, 358 U.S. 920 (1958). Accordingly, the Court should neither consider the General Counsel's belatedly raised exemption 2 defense nor, with regard to the advice and appeals memoranda, the claimed exemption 7 defense.

II. ADVICE AND APPEALS MEMORANDA ARE NOT WITHIN THE SCOPE OF EXEMPTION 5.

A. The Legislative History Demonstrates that Exemption 5 Protects only Legal and Policy Deliberations whose Premature Disclosure Would Impede the Consultative Functions of Government, and not Agency Decisions or Directives.

In explaining the purpose of exemption 5, the House Report on the FOIA declares that "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).[11] Fortunately, the

[11] The use in the House Report of the limiting phrase "routinely be disclosed" has been criticized as an attempt to expand the scope of the exemption contrary to the words of the statute which would seemingly require disclosure whenever any hypothetical party under some, possibly special, circumstances could gain access through discovery. Benson v. General Services Administration, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969). *See* Environmental Protection Agency v. Mink, *supra*, 410 U.S. at 85-86. *Contra* Sterling Drug, Inc. v. FTC, 146 U.S. App. D.C. 237,

(continued)

legislative history of exemption 5 contains considerably more material explaining what Congress perceived to be the privilege's usual limits, and hence the limits of exemption 5. This history demonstrates, we submit, that the fifth exemption was intended to protect only legal and policy deliberations whose premature disclosure would impede the consultative functions of government, and that Congress never intended to allow withholding of agency opinions, interpretations or instructions to staff which affect members of the public. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 6-7, 9 (1965); H. Rep. 1497, *supra*, at 7, 10.

Exemption 5 apparently originated in section 3(c) of S. 1666, 88th Cong., 2d Sess. (1964), which exempted:

> the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rule-making matters. [110 Cong. Rec. 17086 (July 28, 1974)].

At the Senate hearings executive officials urged that the exemption for policy deliberations should not be limited to adjudicatory and rule-making matters.[12] Consequently, when the Senate bill was reported, it expanded the exemption to cover:

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[11] (continued) 243-44, 450 F.2d 698, 704-05 (1971). We do not think it necessary for this Court to decide this issue since, as demonstrated in the following pages, the documents sought in this action do not fall within the scope of the executive's privilege, and so they should be "routinely" made available in discovery. *See generally* K. Davis, Administrative Law Treatise §3A.21, pp. 157-58 (Supp. 1970).

[12] *E.g.*, Hearings on S. 1666 and S. 1663 Before the Subcomm. on Adm. Practice and Proc. of the Senate Judiciary Comm., 88th Cong., 1st Sess. 202-03, 247 (1963).

> intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy [S. 1666, §2(c)(5), *id.*]

The Committee Report explained that:

> . . . there are certain governmental processes relating to legal and policy matters which cannot be carried out . . . "in a fish bowl" [but]
>
> * * *
>
> All *factual* material in Government records is to be made available to the public, as well as *final* agency determinations on legal and policy matters which affect the public. [S. Rep. No. 1219, 88th Cong., 2d Sess. 11 & 7 (1964) (Emphasis in original)]

On the Senate floor Senator Humphrey suggested to Senator Long, a leading proponent of the FOIA, that the section be amended to exempt "intra-agency or inter-agency memorandums or letters dealing with matters of fact, law or policy." He argued:

> As presently written clause (5) of the amended Section 3(c) appears not to exempt intra-agency or interagency [sic] memorandums or letters dealing with matters of fact. For example, clause (5) would apparently not exempt memorandums prepared by agency employees for themselves or their superiors purporting to give their evaluation of the credibility of evidence obtained from witnesses or other sources. The knowledge that their views might be made public information would interfere with the freedom of judgment of agency

> employees and color their views accordingly. Memorandums summarizing facts used as a basis for recommendations for agency action would likewise appear to be excluded from the exemption contained in clause (5) [110 Cong. Rec. 17667 (July 31, 1964)].

Senator Long responded that the suggested amendment was overbroad and unnecessary for the purpose suggested by Senator Humphrey:

> The suggestion with respect to exception (5), adding "matters of fact" to "matters of law or policy" would result in a great lessening of the information available to the public and to the press. Furthermore, the example cited with respect to intra-agency memorandums giving evidence of the credibility of evidence obtained from witnesses or other sources, leads me to point out that there is nothing in this bill which would override normal privileges dealing with the work product and other memorandums summarizing facts used as a basis for recommendations for agency action if those facts were otherwise available to the public. [*Id.* at 17667-68].

With that explanation, the Senate passed the bill without change (110 Cong. Rec. 17668). That bill did not become the law because the House did not act upon the legislation during the 88th Congress.

When S. 1160, the bill which ultimately became the Freedom of Information Act, was introduced in the 89th Congress, it contained the same exemption 5 passed by the Senate in the 88th Congress.[13] During the course of Senate

[13] Hearings on S. 1160, S. 1336, S. 1758 and S. 1879 Before the Subcomm. on Adm. Practice and Proc. of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 7 (1965).

hearings, several agencies expressed apprehension that the language of exemption 5, limiting it to memoranda dealing "solely" with matters of law or policy, would require disclosure of entire documents, including legal and policy recommendations whenever the documents contained any factual information.[14] Thus, to clarify its intention, the Senate substituted the language — "which would not be available by law to a private party in litigation with the agency" — for the wording: "dealing solely with matters of law or policy." S Rep. No. 813, *supra*, 1.[15] The Senate Committee explained (*Id.* at 2 & 9):

> The purpose of clause (5) is to protect from disclosure only those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency. This would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties.

* * *

[14] *See, e.g.*, Hearings on S. 1160, *supra*, at 46 (Treasury Department); *id.* at 236-37 (ICC); *id.* at 266 (NLRB); *id.* at 406-07 (Department of Commerce); *id.* at 417 (Department of Defense); *id.* at 446 (FAA); *id.* at 450 (FCC).

[15] S. 1160 as enacted defined "private party" as "any party other than an agency." Pub. L. 89-487, §3(g), 80 Stat. 251. When the statute was codified, the definition was incorporated into the exemption (Pub. L. 90-23, 81 Stat. 54), giving 5 U.S.C. §552(b)(5) its present wording: "[memorandum] . . . which would not be available by law to a party other than an agency in litigation with the agency." The codification made no substantive change in the FOIA. *E.g.*, H. Rep. No. 125, 90th Cong., 1st Sess. 1 (1967).

> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

The history of the legislation follows the same pattern in the House. The bills introduced into the 89th Congress exempted only materials "dealing solely with matters of law or policy."[16] Several executive agencies complained that this language would force disclosure of law and policy recommendations along with factual information.[17] The House Committee subsequently reported out Senate bill 1160, including the amended exemption 5 (H. Rep. No. 1497, *supra*, at 10), and the bill was swiftly enacted into law.

While the legislative history of exemption 5 does not conclusively answer all questions regarding Congressional intent, it does significantly flesh out the meaning of the words. Congress' intention was to protect executive agencies from being "prematurely forced"[18] to disclose documents

16 Hearings on H.R. 5012-21, 5237, 5406, 5526, 5583, 6172, 6739, 7010, and 7161 Before the Subcomm. of the House Comm. on Govt. Operations, 89th Cong., 1st Sess. 3 (1965).

17 *See, e.g., id.* at 208 (Bureau of Budget); *id.* at 220 (Department of Defense).

18 S. Rep. No. 813, *supra*, at 9 (p. 18, *supra*).

regarding "certain . . . legal and policy matters,"[19] such as (a) memoranda "relating to the consideration and disposition of adjudicatory and rule-making matters,"[20] including those "summarizing facts used as a basis for recommendations for agency action if those facts were otherwise available to the public,"[21] and (b) "the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties."[22] Conversely, Congress sought generally to insure disclosure of certain internal documents such as "factual material"[23] and "final agency determinations on legal and policy matters which affect the public"[24] by excluding them from the coverage of the exemption. Finally, the legislative history indicates that the exemption should be interpreted just "as narrowly as [is] consistent with efficient Government operation."[25]

19 S. Rep. No. 1219, *supra*, at 11 (p. 15, *supra*). *See* S. Rep. No. 813, *supra* at 9 (p. 18, *supra*).

20 S. 1666, *supra*, 110 Cong. Rec. 17086 (p. 14, *supra*).

21 110 Cong. Rec. 17667-68 (p. 16, *supra*).

22 S. Rep. No. 813, *supra*, at 2 (p. 17, *supra*). *See* 110 Cong. Rec. 17667-68 (p. 16, *supra*).

23 S. Rep. No. 1219, *supra*, at 7 (p. 15, *supra*).

24 *Id.*

25 S. Rep. No. 813 (p. 18, *supra*). *See* H. Rep. No. 1497, *supra*, at 10.

B. The Government's Discovery Privilege Protects Only Certain Legal and Policymaking Deliberations.

The language of exemption 5, as interpreted by this Court, "clearly contemplates that the public is entitled to all such memoranda or letters that a private party may discover in litigation with the agency." *Environmental Protection Agency v. Mink, supra,* 410 U.S. at 85-86. Under Federal Rules of Civil Procedure 26 and 34, which are to be liberally construed, a private party is entitled to access to all relevant documents, subject only to claims of evidentiary privilege, and the United States is bound by the Federal Rules of Civil Procedure just as any other litigant. *E.g., NAACP v. Hodgson,* 57 F.R.D. 81, 83 (D.D.C. 1972).

The General Counsel has asserted that his directives and instructions would not and should not be available in discovery (Pet. Br. 21), but the General Counsel does not appear to have analyzed the origin and purpose of the asserted governmental discovery privilege. Private organizations enjoy no general evidentiary privilege protecting their internal communications from discovery. *See, e.g., Kaiser Aluminum & Chemical Co. v. United States,* 157 F. Supp. 939, 944 (Ct. Cl. 1958) (Reed, J.). Any special privilege of the executive branch results from the constitutional and common law doctrine of executive privilege. Since its constitutional elements are apparently limited to communications involving the President,[26] which are not at issue here, we need concern ourselves with only its common

[26] Nixon v. United States, __ U.S. __, 94 S.Ct. 3090, 3106-07 (1974). Communications involving judges and their law clerks or legislators and their aides apparently enjoy similar constitutional protection.

law elements which Congress has embodied in the Freedom of Information Act.[27] We are not dealing here with the executive privileges protecting national security information[28] or informants' identities,[29] but only with a general claim that internal communications must be protected.

The doctrine of executive privilege for internal communications has historically been recognized to protect the "secrets of the cabinet." *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J.). This privilege for high-level policymaking deliberations has been held to include deliberations of decisionmakers in adjudicatory and rule-making proceedings because such proceedings have "a quality resembling that of a judicial proceeding." *United States v. Morgan,* 313 U.S. 409, 422 (1941), *quoting* 298 U.S. 468, 480 (1936). In a much quoted passage from the *Morgan* case, this Court disapproved an order allowing the taking of the Secretary of Agriculture's deposition by

[27] Ethyl Corp. v. Environmental Protection Agency, 478 F.2d 47, 52 (4th Cir. 1973); Philadelphia Newspapers, Inc. v. HUD, 343 F. Supp. 1176, 1178 (E.D. Pa. 1972); Committee on Civil Rts. of the Assoc. of the Bar of the City of New York, Executive Privilege: Analysis and Recommendations for Congressional Legislation 6-7 (1973); *see* Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 712 (E.D. Pa. 1968).

[28] *Compare* United States v. Reynolds, 345 U.S. 1 (1953) (national security privilege in discovery) *with* Environmental Protection Agency v. Mink, 410 U.S. 73 (1973) (protected by exemption 1 of FOIA).

[29] *Compare* Roviaro v. United States, 353 U.S. 53 (1957) (informer privilege in discovery) *with* Evans v. Department of Transportation, 446 F.2d 821 (5th Cir. 1971), *cert. denied,* 405 U.S. 918 (1972) (informant's identity protected by exemption 7 of FOIA).

declaring that "it was not the function of the court to probe the mental processes of the Secretary." *United States v. Morgan, supra,* 313 U.S. at 422, *quoting* 304 U.S. 1, 18 (1938). *But see Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 419-21 (1971).

The recent prominence of the policymaking privilege can be traced to a 1958 opinion of Mr. Justice Reed, sitting by designation, in *Kaiser Aluminum & Chemical Co. v. United States,* 157 F. Supp. 939 (Ct. Cl. 1958), in which the term "executive privilege" was apparently used for the first time in a judicial opinion.[30] The document sought there was an advisory opinion prepared for the Liquidator of War Assets by a "confidential assistant" containing "advice on program policy" with regard to a proposed sale of aluminum plants. *Id.* at 943. The court, after making it clear that it was not dealing with the "primary facts upon which conclusions are based," allowed certain expressions of opinion to be withheld in order to protect the making of "governmental policy." *Id.* at 947. The court reasoned that disclosure would be "injurious to the consultative functions of government" because it would inhibit "open, frank discussion between subordinate and chief," and would, in

30 The year 1958 is also significant because prior to that year most government privilege cases were grounded on the government's alleged authority to withhold documents under the so-called "Housekeeping Statute," 5 U.S.C. §301 (1970) [formerly 5 U.S.C. §22]. In 1958 Congress amended that statute to make it clear that it does not authorize withholding of information from the public. Pub. L. 85-619, 72 Stat. 547 (Aug. 12, 1958). Thus, while some courts have continued to cite pre-1958 precedents without considering either the effect of the 1958 amendment or the legitimate scope of the executive privilege, the trend is to reconsider the scope of the privilege in view of its purposes. *See* Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 713-14 (E.D. Pa. 1968) (for discussion and citation of cases).

effect, allow a party "to probe the mental processes" of the administrator in reaching his conclusions. *Id.* at 946. The *Kaiser* case has been widely followed in cases concerning the government's privilege regarding policymaking deliberations,[31] and factual and investigative matters have been generally found to be disclosable even if other portions were not.[32]

A second, closely related, element of the internal communications privilege is the protection of the government attorney's work product, and deliberations which, if in the private sector, would fall within the attorney-client privilege. In fact, Justice Reed analogized the policymaking privilege recognized in *Kaiser* to the attorney-client privilege. 157 F. Supp. at 946-47. Courts have determined that intra-agency communications concerning litigation strategy are sufficiently analogous to the attorney-client communications to necessitate protection.[33] Similarly, "[t]he

31 *See, e.g.,* Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 280 F.2d 654 (1960) (policy recommendations made to Renegotiation Board); O'Keefe v. Boeing Co., 38 F.R.D. 324 (S.D. N.Y. 1965) (recommendations as to Air Force policy); Walled Lake Door Co. v. United States, 31 F.R.D. 258 (E.D. Mich. 1962) (memoranda and reports pertaining to decision of the Interstate Commerce Commission).

32 *See, e.g.,* Machin v. Zuckert, 114 U.S. App. D.C. 335, 316 F.2d 336, *cert. denied,* 375 U.S. 896 (1963); Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 112-13, 280 F.2d 654, 660-61 (1960); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 327 (D.D.C. 1966), *aff'd,* 128 U.S. App. D.C. 10, 384 F.2d 979, *cert. denied,* 389 U.S. 952 (1957).

33 Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, *supra,* 40 F.R.D. at 323-25. *See, e.g.,* Zacher v. United States, 227 F.2d 219, 226 (8th Cir. 1955), *cert. denied,* 350 U.S. 993 (1956) (recommendations to Attorney General regarding litigation decision); Clark

(continued)

work products of government attorneys are no less protected than those of private attorneys."[34]

With regard to the issue of whether agency policy statements and directives are discoverable, one commentator has pointedly stated that "there are no Rule 26 cases directly on the question," but has argued that "a number of considerations directly support the requirement that an agency disclose the 'working law' which it follows in the disposition of individual cases." Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1058 (1973). Likewise, the Ninth Circuit has stated that Rule 26 cases denying discovery of advisory opinions can be distinguished as not involving recommendations adopted as policy. *GSA v. Benson*, 415 F.2d 878, 881 (1969), *aff'g* 289 F. Supp. 590 (W.D. Wash. 1968).

However, the General Counsel has relied upon considered dictum in *Davis v. Braswell Motor Freight Lines*, 363 F.2d 600 (5th Cir. 1966), a case which antedates the effective date of the Freedom of Information Act. The appellate

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33 (continued) v. Pearson, 238 F.Supp. 495, 496 (D.D.C. 1965) (advisory recommendations as to Justice Department action); United States v. Six Lots of Ground, 27 Fed. Cas. 1097 (C.C. La. 1872) (No. 16,299) (correspondence between Attorney General and district attorney as to dismissing a writ of error).

34 Thill Securities Corp. v. New York Stock Exchange, 57 F.R.D. 133, 138 (E.D. Wis. 1972); *cf.* Hickman v. Taylor, 329 U.S. 495 (1947). Upon a showing of "substantial need" and "undue hardship" a litigant can discover the materials prepared by an adversary's attorney in preparation for trial, except for the attorney's "mental impressions, conclusions, opinions, or legal theories." F.R. Civ. P. 26(b)(3).

court there held that the trial court should have quashed a subpoena for advice memoranda — appeals memoranda were not involved — because the subpoena had been issued to the Regional Director rather than the head of the agency, the General Counsel, as agency regulations required. The court then considered whether, under a proper subpoena to a non-party agency,[35] the advice memoranda would be subject to discovery, answering in the negative, by stating that:

> The asserted purpose of the subpoena was to uncover evidence concerning the Board's findings or determinations, whether preliminary, temporary or final, on the status of the unions as representatives of the employees of Braswell. *Under the circumstances in this case*, we conclude that this objective cannot be satisfied in this manner and that, therefore, the subpoena should have been quashed. [*Id.* at 603 (emphasis added)].

The court then quoted broad language from the *Kaiser* and *Morgan* cases, concluding that there was a "qualified privilege which, in the absence of special circumstances, shields it from examination by the public." 363 F.2d at 604-05 (footnote omitted). To the extent that *Davis* deals with preliminary recommendations, it is correct. But to the extent that it deals with final agency decisions, it is, we submit, in error. *Morgan* and *Kaiser*,

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35 Since exemption 5 allows withholding only of information which would not be available in discovery "with the agency," it is important to keep in mind that "[t]he government is subject to broader discovery in actions brought by or against it than in those in which it is not a party." 4 J. Moore and J. Lucas, Federal Practice ¶26.60[6], at 26-25 (2d ed. 1974) (and cases cited therein).

relied upon by the *Davis* court, did not deal with the question of adopted policy, and the *Davis* court's error resulted from its failure to focus on that distinction.

One district court has, however, recently addressed the agency law issue with regard to certain IRS internal memoranda, concluding that "instructions to staff, and general policy statements or interpretations by the IRS affecting members of the public on the specific issue of depreciation" had to be made available in discovery. *Robins & Wells, Inc. v. United States*, 63 F.R.D. 73, 76-77 (M.D.N.C. 1974). While the court held that private letter rulings and technical advice memoranda did not have to be made available in that case because the plaintiff had failed both to demonstrate their relevancy or materiality and to describe the requested documents with reasonable particularity, it did not say that they were privileged. *Id.* at 77. In fact, in a Freedom of Information Act context, these IRS documents have been found to be agency law, which must be disclosed unless some exemption other than (b)(5) is found to be applicable. *Tax Analysts and Advocates v. IRS*, No. 73-1978 (D.C. Cir., Aug. 19, 1974), *aff'g in part, rev'g in part*, 362 F. Supp. 1298 (D.D.C. 1973).

The validity of the determination that relevant statements of agency policy, interpretations, and instructions to staff adopted by the agency should generally be available in discovery is supported by consideration of the reasons for the executive's qualified privilege for internal communications. As the foregoing discussion revealed, the privilege is intended to protect the free and frank flow of opinions when policy-making officials must consult with subordinates for advice. Disclosure of such information might in some instances unduly subject subordinates to harsh criticism which should rightly be aimed only at officials ultimately

responsible for agency decisions, and, conversely, disclosure of agency working papers may actually mislead rather than help the public because of their preliminary and changeable character. *See, e.g., Sterling Drug, Inc. v. F.T.C.*, 146 U.S. App. D.C. 144, 152, 448 F.2d 698, 706 (1971).

This balance, however, changes significantly when one considers policy, interpretations, or instructions to staff which have already been adopted by the agency. Disclosure of adopted policy should not inhibit agency discussion because: (1) a staff member's career rewards from having his recommendation adopted far outweigh any possible detriment from resulting public criticism; and (2) criticism for adopted policy will be aimed at the "agency," not individual staff members. On the other hand, the public's need for access to adopted agency policy is acute. In ignorance of (or with unequal access to) such policy statements, which are available only from the agency, parties cannot intelligently frame their arguments. Additionally, public criticism of agency policy, as opposed to intra-agency recommendations, and of inconsistent agency application of such policy, should be encouraged.

This analysis demonstrates that the executive's internal communications exemption applies only to advice and recommendations given on certain legal or policymaking matters. It includes adjudicatory and rulemaking decisions — one cannot probe the decisionmaker's mind — and it includes attorney-client and attorney work product information. The privilege is intended to protect the deliberative process whereby (sometimes controversial) policy is formulated: it is not intended to protect policy decisions already made.

C. Advice and Appeals Memoranda Are Agency Law Which Must Be Disclosed.

Having thus concluded that final agency determinations on legal and policy matters which affect the public must be disclosed, we next consider whether advice and appeals memoranda fit that description. Only if they do not fit that description is it necessary to independently consider whether, even though they are internal memoranda under exemption 5, they should nevertheless be disclosed on the ground that their production would not be "injurious to the consultative function of government that the privilege of non-disclosure protects." *Environmental Protection Agency v. Mink, supra,* 410 U.S. at 87, *quoting Kaiser Aluminum & Chemical Corp.*, 157 F. Supp. 939, 946 (Ct. Cl. 1958).[36]

In section 552(a)(2), Congress delineated three somewhat overlapping categories of agency law which are not protected by exemption 5:[37]

[36] We thus respectfully suggest that if, in the tandem case, *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, No. 73-1316, respondent Grumman is correct in its argument that the documents it seeks are agency opinions (and we agree that it is correct), then there is no reason to ask whether they are nonetheless within exemption 5 (Brief for Respondent 20), because Congress has excluded all agency opinions from the coverage of exemption 5.

[37] The General Counsel conceded below that in the performance of his pre-complaint prosecutorial authority, he, or more correctly the Office of the General Counsel, is an agency within the meaning of 5 U.S.C. §551(1) (Pet. App. C, p. 6a n.4). We do not understand him to dispute that fact at this late stage. In any event, that fact seems indisputable: in making the final decision as to whether or not a complainant can gain access to the NLRB, the General Counsel acts as an "authority" of the Government and is therefore, an "agency." (continued)

> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;[38] and
>
> (C) administrative staff manuals and instructions to staff that affect a member of the public.

Both Judge Corcoran in the district court, and Judges Miller, Wright and Robb in the Court of Appeals, held that advice memoranda were mandatory "instructions to staff" and that appeals memoranda were "final opinions" in the adjudication of cases. We think that these determinations are supported by the record, and that, in any event, the advice and appeals memoranda are "statements of policy and interpretations which have been adopted by the agency [the Office of the General Counsel]."

Much of the General Counsel's contrary argument is no more than a war of semantics: another in the legion of cases in which we have been involved where "lawyer's

[37] (continued) 5 U.S.C. §551(1). *See* Washington Research Project, Inc. v. HEW, No. 74-1027, slip op. 11-17 (D.C. Cir., Sept. 12, 1974); Soucie v. David, 145 U.S. App. D.C. 144, 448 F.2d 1067 (1971).

[38] The FOIA also requires publication in the Federal Register of "statements of *general* policy or interpretations of *general* applicability formulated and adopted by the agency." 5 U.S.C. §552(a)(1)(D) (emphasis added). Thus section 552(a)(2)(B), quoted in the text, concerns only policy statements and interpretations of limited or specific applicability.

verbiage" given in affidavit form has transformed insignificant differences into major bones of contention. *See, e.g., Ditlow v. Volpe*, 362 F. Supp. 1321 (D.D.C. 1973), *rev'd as to a different issue*, ___ U. S. App. D.C. ___, 494 F.2d 1073, *cert. denied*, 43 U.S.L.W. 3256 (Oct. 29, 1974) (No. 73-1780). For example, the General Counsel claims on the one hand that advice and appeals memoranda are "not used or cited as precedents" (Pet. Br. 6), while on the other hand he states that all questions presenting "novel or complex problems" are required to be submitted to the General Counsel's Division of Advice so that a uniform policy can be created throughout the country (Pet. Br. 4). How a uniform policy can be created without the use of precedent is difficult to fathom. Moreover, if they are not used as precedent, it is mystifying why the Division of Advice bothers to either index its memoranda (Pet. Br. 6 n.5) or to refer to prior memoranda in later cases (Pet. Br. 5).

Similarly, the General Counsel says that he has delegated to Regional Directors only the initial power to decide whether to issue complaints (Pet. Br. 3), yet he claims that the "ultimate decision" on whether to file the complaint lies with the Regional Director (Pet. Br. 6). Moreover, he has been able to cite no case in which Regional Directors did not take the action directed in "advice" memoranda (Pet. Br. 6). Finally, the General Counsel's assertion — that in some cases where a memorandum directs the issuance of a complaint, the memorandum "may" discuss settlements (Pet. Br. 5) — is both irrelevant, since the courts below said that such information could be deleted (Pet. App. C, pp. 9a, 10a), and circumspect, since the General Counsel, who now makes all of these memoranda public at the end of a proceeding (Pet. Br. 10 n.12),

was not able in the district court to cite even one example containing settlement advice.

1. Appeals Memoranda Are "Final Opinions" or "Orders," "Made In The Adjudication Of Cases"

Neither the House nor the Senate Reports lend much light to the meaning of subsection (a)(2). The Senate Report repeats the statutory language (S. Rep. 813, *supra*, at 6-7), and the House Report's elaboration is that: "the bureaucracy has developed its own form of case law. This law is embodied in the thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available under subsection (b) of S. 1160." H. Rep. No. 1497, *supra*, at 7.

With this background, we must consider the words of the Act — "opinions," "order," and "adjudication." As has been explained by Professor Davis, these are much broader concepts under the Administrative Procedure Act (APA) than one not familiar with it might suppose. K. Davis, Administrative Law Treatise §3A.8, at 128 (Supp. 1970). "'Order' means the whole or any part of a final disposition . . . of any agency in any matter other than rulemaking but including licensing," 5 U.S.C. §551(6), and "'adjudication' means agency process for the formulation of an order." 5 U.S.C. §551(7). An "opinion" is, of course, an explanation of, or justification for, an order. Thus, under the applicable APA definitions, every order is issued as part of the final disposition, affirmative or negative, of an adjudication. Therefore, since advice and appeals memoranda are final dispositions of the agency's duty to determine whether a complainant may have access to the NLRB process, they are orders and opinions in the adjudication of cases.

The General Counsel's contrary claim is dependent upon significant omissions and the use of words with double meanings. He asserts that:

> An appeal memorandum is not the "final disposition" by the agency of the unfair labor practice complaint, since, in sustaining the appeal, the General Counsel has directed that a complaint be filed and the adjudicatory process begin. [Pet. Br. 45 n.33].

In the first place, this statement is dependent upon reading the word "agency" to mean the NLRB, omitting the fact that the Office of the General Counsel is itself an agency. Second, even reading agency to mean NLRB, the decision *not* to file a complaint is certainly a "final disposition" cutting off all access to the Board's processes.[39]

[39] In fact, from the public's standpoint those advice memoranda which instruct the regional director *not* to issue a complaint may be the most important of all the documents sought, especially since appeals memoranda are no longer written in cases affirming a decision not to file a complaint (A. 94-95; Pet. Br. 7). Certainly, absent an appeal to the General Counsel, an advice memorandum is the final disposition of the case. In fact, while a charging party may as a general rule stand about a 1 in 20 chance of securing a reversal by the General Counsel on appeal (Op. App. A 15), his chances are, despite the apparent success of Sears in this particular case, a great deal slimmer where the Division of Advice has already decided that no complaint should issue, especially since the General Counsel or an immediate subordinate participates in the decisions in both advice and appeals cases. Most certainly, an advice memorandum which orders the dismissal of a case does not contain settlement strategies or the like since there is nothing to settle. While in a case where a complaint is filed, the public may eventually be able to discern the reasons for the General Counsel's decision from his presentation before the Board, no such (continued)

Conversely, the decision to file a complaint is the final disposition of the issue of whether the Board's processes shall be available to a complainant. Finally, the General Counsel's reasoning is circular in that he says that an appeal memorandum is not a final disposition because the adjudicatory process has not begun, whereas the question of whether the adjudicatory process has begun hinges on whether the General Counsel's action is a "final disposition."

The General Counsel's appeals memoranda are orders, and opinions explaining those orders, made in the adjudication of cases which have far too long been cloaked in secrecy. As the General Counsel himself admits, their disclosure "produces a better informed labor bar and public and affords me the opportunity to receive comments on my action." (Pet. Br. 46 n.34, *quoting* A. 150).

2. Advice And Appeals Memoranda Are Statements Of Policy And Interpretations Which Have Been Adopted By The Agency.

Subsection (a)(2)(B) — "those statements of policy and interpretations which have been adopted by the agency" — on its face is the broadest and clearest of the categories of agency law which must be made available to the public. Policy statements or interpretations are not limited to those

[39] (continued) opportunity ever occurs when a complaint is not filed. Further, when the Washington Office decides a novel question, it creates a new national policy of which the public should be apprised. It is no answer to say that, under the pressure of this litigation, the General Counsel has begun to make available advice and appeals memoranda in closed cases (*see* Pet. Br. 10 n.12) because, if this was merely a discretionary decision, a less benevolent General Counsel might in the future reverse that policy on the ground, for example, of administrative convenience.

made in adjudication, since then they would be part of an (a)(2)(A) opinion, and (a)(2)(B) would be superfluous. Neither are they limited to those policy statements and interpretations used as precedent – in fact, if they are used as precedent, they must be published in the Federal Register pursuant to subsection (a)(1)(D). *Tax Analysts and Advocates v. IRS*, 362 F. Supp. 1298, 1303-04 (D.D. C. 1973), *aff'd in part, rev'd in part on other grounds*, No. 73-1978 (D.C. Cir., Aug. 19, 1974); K. Davis, *supra*, at 130.

With regard to legislative history, the Senate committee once again restated the words of the Act without explanation or qualification, presumably with the intent that the words of the Act should be given their plain meaning. S. Rep. No. 813, *supra*, at 6. The House Committee, on the other hand, grouped together "statements of policy, interpretations, staff manuals and instructions," stating that "[t]his material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the present statute [old Section 3 of the APA] these Federal agency decisions have been kept secret from the members of the public affected by the decisions." H. Rep. No. 1497, *supra*, at 7.[40] Curiously, this "statement

[40] The same report somewhat qualifies the above statement by adding that "an agency may not be required to make available . . . any advisory interpretation on a specific set of facts which is *requested by and addressed to a particular person*, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as a precedent in the disposition of other cases. *Id.* (emphasis added). Since the term "person" excludes agency personnel (5 U.S.C. §551(2)), this qualifying statement is inapposite to the facts of this case where interpretations are addressed to Regional officials of the General Counsel's Office. In any event, the accuracy of this statement, which appears to conflict with the Senate report, is

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is in the form of a statement of fact, not a statement of intent, and as a statement of fact it seems clearly mistaken; interpretations are made not only as the end product of administration but at any interim stage of administration." K. Davis, *supra*, at 135. Many interim interpretations – *e.g.*, an administrative law judge's opinions, decisions based on interpretations of the law to prosecute A and not B, or to settle with C and not D – are effectively the law. Private parties affected by such agency law should be entitled to have access to it. Thus, this Court should accept the literal words of the statute, as repeated in the Senate report, rather than the somewhat ambiguous "end product" statement written into the House report. *Tax Analysts and Advocates v. IRS, supra*, 362 F. Supp. at 1304.

Statements of agency policy and interpretations such as those contained in advice and appeals memoranda are not in any way preliminary views, but rather are the working law of the agency. As such they are exactly the type of agency directives which Congress required to be made public. Not only will disclosure lead to better justice because affected parties will have a chance to know the agency's law, but public criticism aimed mainly at the agency which has adopted the policy, should have a salutary effect.

[40] (continued) questionable. *See* K. Davis, *supra*, 131-32. Several courts have stated that the House report "represents the thinking of only one house, and to the extent that the two reports disagree, the surer indication of congressional intent is to be found in the Senate report, which was available for consideration in both houses." Benson v. GSA, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd on other grounds*, 415 F.2d 878 (9th Cir. 1969). *Accord*, Getman v. NLRB, 146 U.S. App. D.C. 209, 212, n.8, 450 F.2d 670, 673 n.8 (D.C. Cir.), *stay denied*, 404 U.S. 1204 (1971); Tax Analysts and Advocates v. IRS, *supra*, 362 F. Supp. at 1304; Consumers Union v. Veterans Administration, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

3. Advice Memoranda Are Administrative Instructions To Staff That Affect A Member Of The Public

Subsection (a)(2)(C) requires every agency to make available for public inspection "administrative staff manuals and instructions to staff that affect any member of the public." As pointed out by the General Counsel (Pet. Br. 42), an earlier version of the bill did not contain the word "administrative." It was inserted by the Senate committee which explained the addition of the word as follows:

> The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action [S. Rep. 813, *supra*, at 2].

From this statement, the General Counsel concludes that instructions regarding "administrative matters" must be made public, but that instructions regarding "law enforcement matters" may be kept secret (Pet. Br. 43), a dichotomy which appears plausible.[41] But the General Counsel's assertion that advice memoranda, which deal with administrative enforcement of law, may therefore be withheld

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[41] The General Counsel's simultaneous arguments that advice and appeals memoranda do not concern "administrative matters" (Pet. Br. 43), but that they are nonetheless "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. §552(b)(2) (Pet. Br. 37), is incongruous to say the least.

is not plausible because the Senate committee explicitly explained that by law enforcement matters it referred to "prosecuting violations of law in court." The dichotomy, it thus turns out, is between enforcement in court and enforcement in an agency. While the wisdom of Congress' action may be questioned in some particular cases, the Senate report leaves no alternative.

While the explanation given in the House report contradicts the Senate's interpretation, it also contradicts the words of the statute since it would allow withholding of a great deal of policy information which seriously affects the public: "an agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff in auditing or inspection procedures, or in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases." H. Rep. No. 1497, *supra*, at 7-8. This statement, which would allow withholding of substantive and procedural agency law contained in staff manuals or instructions to staff, would take back most of what the words of the statute gave. For example, under the House committee's interpretation, IRS staff manuals and instructions to staff would not be available to the public, but the courts have held otherwise. *Hawkes v. IRS*, 467 F.2d 787 (6th Cir., 1972); *Long v. IRS*, 349 F. Supp. 871 (W.D. Wash. 1972); *Long v. IRS*, 339 F. Supp. 1266 (W.D. Wash. 1971). The House report's language is an apparent attempt to amend the Act, already passed by the Senate, without changing the words of the statute. This Court should reject that attempt.

Two courts of appeals, apparently finding the confusion caused by the Committee reports to be hopeless and

rejecting the consequences of a literal reading of the statute as unacceptable, have adopted a third course. In *Hawkes v. IRS*, 467 F.2d 787, 795 (6th Cir., 1972) and *Stokes v. Brennan*, 476 F.2d 699, 701 (5th Cir., 1973), these courts concluded that Congress intended that staff manuals and instructions to staff should generally be disclosed, but that a limited exception would be recognized allowing deletions "to bar disclosure of information which, if known to the public, would *significantly impede* the enforcement process." *Id.* In explanation, the *Stokes* court quoted the following language from the *Hawkes* opinion:

> Law enforcement is the process by which a society secures compliance with its duly adopted rules. Enforcement is adversely affected *only* when information is made available which allows persons simultaneously to violate the law and to avoid detection. Information which merely enables an individual to conform his actions to an agency's understanding of the law applied by that agency does not impede law enforcement and is not excluded from compulsory disclosure under (a)(2)(C).
>
> Far from impeding the goals of law enforcement, in fact, the disclosure of information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law. Such clarifying information . . . may be found in the criteria for investigative action; in standards for evaluation and so forth. Materials providing such information are

> administrative in character and clearly discloseable under (a)(2)(C). [*Id.* (emphasis in original; footnote omitted)].

This, in fact, appears to be the course taken by the district court in this case as it ordered disclosure of the advice and appeals memoranda but allowed the deletion of "the names of affiants, and settlement suggestions from the Office of the General Counsel to the regional directors." (Pet. App. C, p. 9a). This result will allow the General Counsel to withhold, until trial, the identity of informers and his settlement strategy. But there is no reason to go further in order to keep secret the General Counsel's instructions concerning his interpretations of the law. In fact, the one thing which the legislative history of subsection 552(a)(2) does make clear is that Congress intended to force agency statements and interpretations of legal and policy matters into public view. Congress embraced the view, later stated by Professor Davis, that "secret law is an abomination." K. Davis, *supra*, p. 137.

D. Advice And Appeals Memoranda Should In Any Event Be Released Because Disclosure Will Not Injure The Consultative Functions Of Government

The Freedom of Information Act mandates disclosure of all identifiable records not specifically exempted, 5 U.S.C. §552(a)(3). Thus, even if advice and appeals memoranda were not required by 5 U.S.C. §552(a)(2) to be made publicly available, disclosure upon request is necessary because the General Counsel has failed to carry his burden of proving the applicability of any exemption. In this respect, defendant's reliance upon exemption 5 is misplaced

because advice and appeals memoranda do not fall within the Congressionally recognized scope of that exemption and because disclosure would not harm the "consultative functions" of government. *See Environmental Protection Agency v. Mink, supra,* 410 U.S. at 87. Courts have generally allowed withholding under exemption 5 only of legal or policy-formative advice, and we suggest that the cases define the proper limits of the exemption. In addition, the fact that the General Counsel himself now makes all of the memoranda available when a proceeding is closed (Pet. Br. 10 n.12) indicates that no significant inhibition to agency policy deliberations would result from their disclosure at a time when they may still be useful to litigants in that and other pending proceedings.

In *Environmental Protection Agency v Mink, supra,* 410 U.S. at 93, 89, this Court recognized that the purpose of the fifth exemption is to permit frank discussion of policy matters in agency deliberations, and concluded that, since protection of purely factual or investigative materials was not necessary to further this purpose, such materials should be disclosed.[42] In reaching this conclusion, it accepted the District of Columbia Circuit's statement that any factual material not inextricably "intertwined with policymaking processes" must be disclosed if

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[42] While the pending amendments to the FOIA would explicitly override this Court's decision in the *Mink* case with regard to the national security exemption (5 U.S.C. §552(b)(1)), they will not affect the portion of that decision dealing with the (b)(5) internal policymaking exemption, except to make clear Congressional agreement with this Court's statements that non-exempt, segregable portions of agency records must be separated and disclosed. *See* H. Rep. 93-1380, *supra,* at 4, 13.

that can be done "without impinging on the policymaking decisional processes intended to be protected by this exemption." *Id.* at 92, *quoting* 150 U.S. App. D.C. 223, 237, 238, 464 F.2d 742, 746, 747 (1973). It also stated that the agency should be given the opportunity to prove by affidavits or other evidence that particular documents fell within the protected policy-formative category and contained no separable, factual information. 410 U.S. at 92.

The factual/policymaking test of *Mink* has been more fully developed by the D.C. Circuit in the case being argued in tandem with this one, *Grumman Aircraft Engineering Corp. v. Renegotiation Board,* 157 U.S. App. D.C. 121, 482 F.2d 710 (1973), *cert. granted,* 94 S.Ct. 2603 (1974),[43] and in *Montrose Chemical Corp. v. Train,* ___ U.S. App. D.C. ___, 491 F.2d 63 (1974). Using a method of analysis very similar to that used by this Court in *Mink,* the D.C. Circuit in *Grumman* recognized that "[p]rotecting the confidentiality of advice given during governmental deliberations prior to actual promulgation of policy is, of course, eminently sensible," but that "the case for applying the privilege, and thus the exemption, is markedly weaker where the documents at stake are not solely part of the consultative and deliberative process, but rather reflect actual decisions communicated outside the agency."

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[43] We note that the Government's Supreme Court brief in *Grumman* reveals that its challenge is apparently not to the Circuit Court's statement of the law, but rather to its application in the Renegotiation process – a process whose peculiar features led to a reversal in *Renegotiation Board v. Bannercraft Clothing Co., Inc.,* 415 U.S. 1 (1974). In *Grumman,* however, the Renegotiation Board's changes of procedures, and decision to begin publishing opinions, have narrowed the issue to a dispute about the finality of the Regional Board's reports under prior practice.

482 F.2d at 718. *See* K. Davis, *supra*, at 159. The D.C. Circuit thus concluded that "a distinction must be drawn between documents composed exclusively for purposes of assisting policy formulation and those which serve to reflect policy already made and announced." 482 F.2d at 719 (footnote omitted). Therefore, Regional Renegotiation Board reports, whose purpose the Court found was to support the agency's decision, had to be disclosed. Similarly here, the General Counsel communicates to the parties the decisions made in advice and appeals memoranda, but he refuses to reveal the policy statements reflected in those memoranda which give the reasons for his decision.

In another carefully reasoned opinion, the D.C. Circuit in the *Montrose Chemical Corp.* case further developed the exemption 5 test. It held that summaries of factual information, prepared by the staff of the Environmental Protection Agency solely to aid the Administrator in making a decision in a complex adjudicatory proceeding for cancellation of DDT registrations, were part of the deliberative process protected by exemption 5, where all of the facts were on the public record and the Administator explained his decision in a 50 page opinion. 491 F.2d at 64-65, 68. Looking to the purpose behind the exemption and relying heavily upon the *Morgan* cases (*see* pp. 21-22, *supra*), the Court declared "that the purpose of exemption 5 is not simply to encourage frank intra-agency discussion of policy, but also to ensure that the mental processes of decision-makers are not subject to public scrutiny." *Id.* at 70 (footnote omitted). In other words, deliberations in the course of making adjudicatory decisions or of formulating policy are protected whether or not the particular materials contain overt recommendations on policy, a result seemingly compelled by the legislative history of the

FOIA (*see* p. 16, *supra*).[44] Thus, in this case, if Sears were seeking the preliminary drafts of advice and appeals memoranda, *Montrose* would apply, but here Sears is seeking only the advice and appeals memoranda themselves. Since the memoranda are the functional equivalent of the Administrator's 50 page final opinion, they should be disclosed.

The dichotomy between deliberative, policy-formative documents on the one hand, and finalized or decisional documents on the other hand, has also been recognized in other judicial circuits. For example, in *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 660 (1972), the Sixth Circuit distinguished between documents containing expressions of "preliminary views," opinions, and recommendations made during agency policy deliberations, which fall within exemption 5, and documents that are "finished work product" or final reports, which must be disclosed.[45]

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[44] The *Montrose* court indicated that there might be a distinction between situations "where all facts are already on the record," and a situation "[w]here the factual material is not already in the public domain." 491 F.2d at 71.

[45] *Accord*, Philadelphia Newspapers, Inc. v. HUD, 343 F. Supp. 1176 (E.D. Pa. 1972); *see* GSA v. Benson, 415 F.2d 878 (9th Cir. 1969). *See also* Sterling Drug, Inc. v. FTC, 146 U.S. App. D.C. 237, 243, 450 F.2d 698, 704 (1971) ("internal working papers in which opinions are expressed and policies formulated and recommended" may be withheld, except for factual portions); International Paper Co. v. FPC, 438 F.2d 1349, 1359 (2d Cir)., *cert. denied*, 404 U.S. 827 (1971) (documents withheld "were merely preliminary interagency memoranda, compiled preparatory to the formulation of the Commission's final decisions"). *But compare* Washington Research Project, Inc. v. HEW, No. 74-1027 (D.C. Cir., Sept. 12, 1974) ("evaluative" reports regarding grant applications are protected by exemption 5) *with* Soucie v. David, 145 U.S. App. D.C. 144, 147, 448

(continued)

Likewise, advice and appeals memoranda, which are issued after careful examination and consideration, are neither preliminary nor deliberative, and they are not concerned with recommending policy alternatives, but only with informing the Regional Office of what the agency's policy is.

Thus, the recommendations of a law clerk concerning a case in agency adjudication, a document containing the advice of a trial attorney to his section chief as to whether a case should be appealed, or a staff recommendation suggesting which of two alternative policies should be adopted, would generally be exempt. But those situations do not describe this case. Advice and appeals memoranda are not compiled by law clerks, by trial attorneys, or by staff members requested to aid an administrator in formulating policy.

Although the General Counsel refers to these memoranda as "preliminary" and as containing merely his "mental impressions" (Pet. Br. 23) – through his staff attorneys – the fact is that these memoranda generally go through

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45 (continued) F.2d 1067, 1070 (1971) (remanded for determination of whether exemption 5 applied to "the Garvin Report, which evaluates the Federal Government's program for development of a supersonic transport aircraft (SST)") *and* Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977 (1974) (remanded to determine whether "evaluations of certain agencies' personnel management programs" are within exemption 5). On remand, the district court in *Vaughn* ordered disclosure of all but a small proportion of the Civil Service reports sought on the ground that they were not advisory opinions or policy recommendations but instead documents which adhered to policy already made. Vaughn v. Rosen, Civ. No. 1753-72, slip. op. 5-7 (D.D.C., Oct. 9, 1974).

several drafts before reaching the final form which is transmitted to the Regional Offices. They do not consist of the type of quick comments or preliminary, subjective views which exemption 5 was intended to protect. They are documents produced by supervisory personnel whose job is to decide whether a party should be permitted access to the process created by Congress to handle labor disputes. We do not contend that suggestions moving from a supervisor to a subordinate need be disclosed, but that agency directives which affect the rights of members of the public, and which by definition move from supervisor to subordinate, should be disclosed upon request. *See, e.g., Stern v. Richardson*, 367 F. Supp. 1316 (1973). Although prepared by attorneys, advice and appeals memoranda are the agency's basic guidelines to its field offices in the handling of cases involving private parties, and as such they are something altogether different from the work product of a private attorney.

In the courts below, as in almost every case under exemption 5, the claim was made that disclosure of these memoranda would inhibit evaluators and make them less candid, thereby thwarting the purpose of the exemption. But this argument proves too much, for the same can be said of every piece of paper reflecting the ideas or views of a government employee, yet every such document is not immune from disclosure. Exemption 5 has not been construed so broadly, but has been applied only in the narrow area of policy formulation in its preliminary stages. Since advice and appeals memoranda are neither preliminary nor recommendatory, but are final and decisional, they are not exempt from mandatory disclosure.

Furthermore, since any inhibiting effect that disclosure might have upon agency deliberations will result whenever

participants know that their views will be made public in the foreseeable future, the fact that the General Counsel himself now discloses all of these memoranda at the close of proceedings (Pet. Br. 10 n.12) indicates that disclosure upon transmittal to the Regional Offices will not inhibit agency discussions. *See M.A. Schapiro & Co., Inc. v. SEC*, 339 F. Supp. 467, 469 (D.D.C., 1972). While the General Counsel may believe that there are other reasons for secrecy, they are not reasons recognized by Congress in the fifth exemption. There is simply no basis for concluding that disclosure here will injure the "consultative functions" of government. *See Environmental Protection Agency v. Mink, supra*, 410 U.S. at 87.

Finally, immediate availability of advice and appeals memoranda will clarify the law, focus the arguments of litigants before the NLRB, and, by increasing the public's knowledge of the General Counsel's views, will encourage voluntary compliance. Also, the benefits which convinced the General Counsel to make these memoranda available at the close of a proceeding – greater public understanding, trust, and criticism of the General Counsel's policies (Pet. Br. n.34) – will be even greater if the public learns of the General Counsel's positions at a time when public comments may still have some effect.

In short, nothing in the legislative history, the policies behind exemption 5, or the relevant authorities would permit the General Counsel to withhold advice and appeals memoranda, and there are substantial reasons why they should be immediately made available to the public.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1233

NATIONAL LABOR RELATIONS BOARD and
PETER G. NASH, GENERAL COUNSEL,

Petitioners,

—v.—

SEARS, ROEBUCK AND COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND CONSUMERS UNION OF UNITED STATES, INC. *AMICI CURIAE*

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In The

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BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND CONSUMERS UNION OF UNITED STATES, INC., AMICI CURIAE

INTEREST OF AMICI[1/]

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 250,000 members dedicated solely to the preservation of the liberties safeguarded by the Bill of Rights. During its fifty-four year existence the ACLU has been particularly concerned with the freedoms protected by the First Amendment to the Constitution, and in recent years it has represented numerous citizens requesting disclosure of information from executive agencies of the Government under the Freedom of Information Act.

Consumers Union of United States, Inc. ("Consumers Union") is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports (magazine and TV) and other publications. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with its 2.2 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

1/ Letters from both of the parties, consenting to the submission of this brief, have been filed with the Clerk.

In connection with its product testing, publishing, and other activities, Consumers Union frequently requests information from government agencies. The first lawsuit under the Freedom of Information Act was brought by Consumers Union to obtain hearing aid test data and scoring methodologies from the Veterans Administration. Consumers Union v. Veterans Administration, 301 F.Supp. 796 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d. Cir. 1971). Soon thereafter, Consumers Union made a particularly helpful contribution as amicus curiae in a FOIA appeal brought by the National Labor Relations Board. See, Getman v. N.L.R.B., 450 F.2d 670, 673, n.25 (D.C.Cir. 1971).

The public's right to know the bases and criteria for decisions made by government agencies is inherent in our system of government. The Freedom of Information Act was passed by Congress to ensure that the public would be able to know how executive agencies were discharging their functions. Amici Curiae believe that this case and its companion, Renegotiation Board v. Grumman Aircraft Engineering Corporation, No. 73-1316, present important questions concerning the reach of the Act to prevent the development of "secret law" by administrative agencies.

STATUTE INVOLVED

The provisions of the Freedom of Information Act, 5 U.S.C. §552, are reproduced at pp. 53-56 of the appendix to petitioners' brief.

QUESTION PRESENTED

Whether the Freedom of Information Act requires disclosure of the General

Counsel's final opinions in advice and appeals cases.

DECISIONS BELOW

The instant FOIA litigation arose out of an unfair labor practice charge filed by Sears which generated both an advice memorandum ordering dismissal of the charge, and an appeals memorandum reversing the latter and ordering the Regional Director to issue a complaint.[2/] During the administrative

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2/All charges under the National Labor Relations Act (29 U.S.C. §151, et seq.) are filed with one of the Board's 31 Regional Directors to whom the General Counsel has delegated his authority to decide whether complaints shall issue. However, to insure a uniform prosecutorial policy, all unfair labor practice charges presenting novel legal or policy issues are referred to the Advice Branch of the Office of the General Counsel for initial disposition. N.L.R.B. Statements of Procedure, §101.8. In such cases, the General Counsel's decision to issue a complaint or dismiss the charge is explained in a written opinion referred to as an advice memorandum.

A Regional Director's refusal to issue an unfair labor practice complaint, whether pursuant to an advice memorandum or not, may be appealed by the charging party to the General Counsel's Office of Appeals. If the Regional Director is reversed, the General Counsel's decision is announced in a written opinion which also "sets forth the reasons why a complaint should issue...." (Pet.Br., p.8) The opinions issued in appeals cases are referred to as appeals memoranda. If the Regional Director's decision not to issue a complaint is sustained, no opinion is prepared. (Pet. Br., p.7)

proceedings on the Labor Act charge, Sears filed suit under the FOIA--naming as defendants both the National Labor Relations Board[3] and its General Counsel--and ultimately secured a court order directing the defendants to disclose and index all appeals and advice memoranda issued by the General Counsel since July 4, 1967, the effective date of the FOIA; to produce any documents incorporated by reference in said memoranda as well as any necessary explanatory material; and to cease his practice of deleting material (such as citations to prior cases) from disclosed advice and appeals memoranda without providing any written justification for the deletions, except that deletions of settlement instructions and names of affiants could continue to be made without written justification. 346 F.Supp. at 755; Pet. App. C, pp.9a-10a.[4] In its opinion, the District Court held that the requested memoranda were instructions affecting the public and final opinions required under 5 U.S.C. §§552(a)(2)(C) and (A), respectively, to be indexed and made available to the public, and that they were not internal memoranda exempt under §552(b)(5). Pet. App. C, pp. 7a and 9a. The court of appeals affirmed, without opinion, in a percuriam decision citing the district court's opinion and the

[3] The General Counsel's motion to dismiss the Board as an improper party, based on the argument that the Office of the General Counsel is an independent agency, was denied.

[4] "Pet.App." refers to the appendix to the petition for writ of certiorari; "Pet. Br." to Brief for the Petitioners; "Op. App." to the appendix to the Brief for Respondents, and "A." to the separate appendix printed pursuant to Rule 36.

recent decision in Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710 (D.C.Cir. 1973), cert. granted, May 28, 1974, No. 73-1316, Pet. App. A., pp. 1a-2a. This Court has set Grumman for oral argument in tandem with the instant case.

STATEMENT OF THE CASE

Amici adopt as their own the detailed statement of the case presented in respondent's brief. Certain facts about the General Counsel's advice and appeals procedures are especially pertinent to the resolution of the legal issues in the instant FOIA case. Briefly summarized, those facts are:

1. Petitioners concede that the General Counsel is an independent agency possessing the unreviewable power to decide which unfair labor practice cases shall be heard by the National Labor Relations Board. 346 F.Supp. at 753, n.4; Pet. Br., p.3. As the threshhold decision-maker--the sentry at the Board's gates--the General Counsel wields enormous power to affect the direction of national labor policy.[5]

2. In the interest of insuring the development of a uniform

[5] According to the National Labor Relations Board Report for the Fiscal Year Ended June 30, 1972, almost 87% of the Board's 25,555 closed cases were closed prior to the issuance of a complaint. Less than 6% of the total cases were closed after a Board or court decision.

prosecutorial policy,[6] the General Counsel's Advice Branch disposes of all unfair labor practice charges involving novel or complex legal issues.

3. A Regional Director's refusal to issue a complaint, whether pursuant to an advice decision or not, may be appealed by the charging party to the

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6/ In testimony before the House Labor Subcommittee on June 29, 1961, the NLRB General Counsel presented the following explanation of the need for a centralized advisory function. (The testimony is reprinted at 1 CCH Labor Law Reporter, §1150.01.)

> Absent some kind of centralized advice section into which important novel and complex legal issues can be channeled, the risk of chaotic developments in the law would be marked. For, were Regional Directors left entirely free in this regard, each might proceed on his own view of a given legal question with the result that the law could, as a practical matter and before Board decision of the issue, be one thing in one Region and conflicting in others. Such a result would be at odds with the statutory purpose of encouraging stability in labor management relations. And the omission of selective control by the General Counsel, over these important cases would amount to a failure to exercise his statutory role in administering the law.
>
> Op App. at 7, emphasis added.

General Counsel's Office of Appeals.

4. Both advice and appeals cases are decided by an agenda consisting of staff and senior attorneys whose decision is either adopted, modified, or rejected by the General Counsel. Op. App. at 3-5, and 11-13.

5. In both advice and appeals cases, the General Counsel's final determination and his reasons therefor are routinely set forth in, respectively, advice memoranda and appeals memoranda.[7]

6. The General Counsel's past practice was to withhold the texts of advice and appeals memoranda from the public. However, while the instant case was pending in the district court, the General Counsel announced he would disclose all advice and appeals memoranda in closed cases. Pet. Br., p.10, n.12.

7. A subject matter index to advice decisions was maintained by the General Counsel before the instant litigation began. A. 148-149; A. 42-44. It was not until after the instant litigation was filed however, that the General Counsel undertook voluntarily to prepare a similar subject matter

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7/ Appeals memoranda are issued only in cases reversing the Regional Director's decision to dismiss an unfair labor practice charge. See, note 1, supra.

index for appeals decisions. Brief for Appellant in the court of appeals, p.29, n.11. Indices to advice and appeals decisions in closed cases are also being made available to the public. A.42-44.

8. In the course of the agenda procedure, prior advice and appeals memoranda are reviewed and analyzed. Op. App. at 3-5, and 11-13. On occasion, the General Counsel cites and even attaches prior opinions to his final advice or appeals decisions. Pet. Br., pp.5-6. These written, indexed opinions do, therefore, have precedential significance in determining whether an unfair labor practice charge shall be dismissed or a complaint filed with the Board.

Summary of Argument

Amici argue that the advice and appeals decisions are "final opinions...and... orders made in the adjudication of cases," "statements of policy and interpretations which have been adopted by the...[General Counsel] and are not published in the Federal Register," and "instructions to staff that affect a member of the public," and that the requested documents are, therefore, required to be made publicly available under section (a)(2) of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(a)(2)(A), (B), and (C). In this connection, amici also argue that the General Counsel's opinions in advice and appeals cases may not be withheld under the FOIA's fifth exemption for "intra-agency memorandums...." 5 U.S.C. §552(b)(5)

Amici do not address petitioners' claim, raised for the first time in this Court, that the requested documents are also exempt under the second and seventh exemptions to the FOIA, 5 U.S.C. §552(b)(2) and (b)(7). We wish to point out only that allowing petitioners to make untimely exemption claims would be inconsistent with a recent line of cases holding that FOIA exemption justifications must be made with particularity and at a very early stage in the litigation. See, Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir. 1973), cert. den., 94 S.Ct. 1564 (1974); Cuneo v. Schlesinger, 484 F.2d 1086 (D.C.Cir. 1973); Pacific Architects and Engineers Incorporated v. Renegotiation Board, No. 73-2093 (D.C.Cir. decided October 8, 1974).

I. The General Counsel Is An Agency Subject to the Public Disclosure Requirements of the FOIA

The express requirement in section (a)(2) that certain information be made public and indexed applies to "(e)ach agency." "Agency" is defined in the Administrative Procedure Act, 5 U.S.C. §551(1) to mean, with certain enumerated exceptions not applicable here, "each authority of the Government of the United States, whether or not it is within or subject to review by another agency...." The General Counsel has conceded that "in the performance of his pre-complaint prosecutorial authority, he is clearly an agency within the meaning of 5 U.S.C. §551(1)." 346 F. Supp. at 753, n.4. Principally, his authority consists of the power to make final, unreviewable decisions as to whether unfair labor practice charges shall be presented to the Board. This statutory function clearly entails the exercise of "substantial independent authority." Soucie v. David, 448

F.2d 1067, 1073 (D.C.Cir. 1973). As a legal consequence of the General Counsel's status as an independent agency, it follows that if the disputed advice and appeals opinions fall within the categories of information specified in section (a)(2) of the FOIA, the General Counsel must index the documents and make them available to the public.

II. Advice and Appeals Memoranda Are Final Opinions and Orders

Section 552(a)(2)(A) requires that agencies index and make available for public inspection and copying "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." The district court held that advice memoranda are "instructions which affect a member of the public" within the meaning of section (a)(2)(C), and that appeals memoranda are "final opinions" within the meaning of section (a)(2)(A). The record, however, reveals no substantial difference between advice and appeals memoranda--indeed, petitioners characterize the two types of documents as "comparable." Pet. Br., p.8. Each is essentially an opinion setting forth the General Counsel's disposition of an unfair labor practice charge and his reasons therefor.8/

8/ Only a small percentage (an average of 10% in 1959 and 1960) of unfair labor practice charges filed with the Regional Directors are referred to the Advice Branch for initial decision. Op.App. 5. Of these, only those resulting in determinations that a complaint should not issue may be appealed. Thus, it is very rare that an unfair labor practice charge generates both an advice and an appeals memorandum. For purposes of the FOIA and the Administrative Procedure

The advice memorandum, as well as the appeals memorandum, "occupies the same opinion status as any document produced by a decision-maker in an adjudicatory-like process [here the Agenda procedure]..." Grumman v. Renegotiation Board, 482 F.2d 710, 713 (D.C.Cir. 1973).

Advice and appeals memoranda are the mechanisms the General Counsel uses to announce and explain final dispositions of requests by aggrieved parties that unfair labor practice complaints be filed with the Board. The General Counsel's final decisions in advice and appeals cases are recorded in written opinions which are being or will be indexed. In these opinions, the General Counsel discusses, distinguishes, repudiates, or follows the legal reasoning of prior decisions. In sum, the advice and appeals memoranda are formal statements of the law governing the General Counsel's disposition of unfair labor charges.

To the extent that advice and appeals opinions are withheld or not promptly disclosed, they constitute the kind of secret agency law Congress expressly sought to eradicate when it enacted the FOIA. See, e.g., Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); Tax Analysts and Advocates v. I.R.S., No. 73-1978 (D.C. Cir. 8/19/74); Davis, Admin. Law Tr. §§3A.9, .11, .12, .14, and .21 (1970 Supp.). In a

8/(con't.) Act, 5 U.S.C. §551 et seq., an advice opinion is "final" whether or not it could be reviewed by the Office of Appeals. See, alternative holdings in Grumman v. Renegotiation Board, 482 F.2d 710, 713 (D.C. Cir. 1973).

rare display of unanimity, the House and Senate committees gave virtually identical reasons for the requirement in section (a)(2) that agency opinions and orders not only be disclosed, but that they also be indexed.

> The indexing requirement will prevent a citizen from losing a controversy with an agency because of some obscure or hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way to discover it. H.R. Rep. No. 1497, 89th Cong., 2d Sess., 8 (1966).

> Requiring the agencies to keep a current index of their orders, opinions, etc., ...will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it. S.Rep. No. 813, 89th Cong., 1st Sess., 7 (1965) (hereinafter S.Rep.).

Although the General Counsel is indexing advice and appeals memoranda, he maintains that these written opinions may be kept secret indefinitely or, as is his current practice, until the underlying labor charge has been adjudicated by the Board.

Requiring agencies to make their law public serves several beneficial policies not the least of which is that persons are better able to conform their conduct to the requirements of the law as interpreted and applied by the agency. In this connection,

if complete information about an agency's past decisions is available, persons are in a much better position to predict what action the agency is likely to take in future cases. Furthermore, as the legislative history emphasizes, parties to agency proceedings must know what the agency's law is in order to present their cases most effectively. One final salutary effect of requiring disclosure of agency law is that the public is given an opportunity to examine the agency's decisions, thereby creating an incentive for the agency to be consistent and fair in its adjudications rather than arbitrary and capricious.

The General Counsel argues that advice and appeals memoranda are not "final opinions...and...orders, made in the adjudication of cases" because only the Board can adjudicate unfair labor practice cases. The General Counsel's contention that he does not adjudicate cases is both factually and legally unsupportable. As a factual matter, the General Counsel decides which unfair labor practice charges are meritorious and which shall be dismissed. Pet. Br., p.3. The General Counsel's decision to dismiss a charge or to file a complaint is as final and has as much impact on the parties as any determination the Board might subsequently make.9/ In effect, the General Counsel adjudicates all "cases" initiated

9/ The General Counsel's refusal to issue a complaint may not be reviewed by the Board nor, in general, by the courts. See, Balanyi v. Local 1031, Internat'l Bro. of Electrical Wkrs., 374 F.2d 723 (7th Cir. 1967). Furthermore, only a very small percentage of unfair labor charges result in complaints. See note 5, supra.

by an unfair labor practice charge, whereas the Board adjudicates only those "cases" initiated by a complaint filed by the General Counsel.

The agenda procedure[10/] the General Counsel follows in deciding advice and appeals cases is an adjudication under the Administrative Procedure Act, 5 U.S.C. §551. Section 2(d) of the APA defines "adjudication" to mean "agency process for the formulation of an order." 5 U.S.C. §551(7). "Order" is defined to mean "the whole or any part of a final disposition...of an agency in a matter other than rulemaking but including licensing." 5 U.S.C. §551(6). Nothing could be more final than the General Counsel's disposition of unfair labor charges; his decisions granting or denying access to the Board are unreviewable. Parties whose charges are dismissed have no further recourse; parties against whom complaints are filed have no alternative but to settle or defend themselves before the board.

All advice and appeals memoranda include final orders, i.e., they either grant or deny the charging party's request that the General Counsel file a complaint with the Board.

> An "order" may say no more than "application granted" or "application denied" but that much has to be open to public inspection;

10/ Op.App. at 3-5, and 11-13. An agenda is a group of staff and senior attorneys who prepare and recommend decisions in advice and appeals cases for the General Counsel.

> whether that much may be meaningful has to depend upon the application of the Information Act to the other papers in the case. Davis, Admin. Law Tr. §3A.8, at p. 128 (1970 Supp.).

The record in the instant case indicates that the General Counsel routinely makes prompt disclosure of the "order" portion of advice and appeals opinions. The disclosure is made in letters to the parties advising them of the outcome of advice and appeals proceedings.

But, advice and appeals memoranda are more than terse orders announcing the outcome of the General Counsel's final prosecutorial deliberations. They are also opinions setting forth the General Counsel's legal and policy rationales for his decision in the particular case. At present, however, the texts of advice and appeals memoranda are not promptly disclosed; these final opinions are withheld until the underlying unfair labor practice case is closed. Congress provided no exceptions to the broad requirement in section (a)(2)(A) that all agency opinions and orders be made public. Thus, this Court should hold that the General Counsel is required to disclose all advice and appeals memoranda whether or not the underlying unfair labor practice cases are pending before the Board. Grumman v. Renegotiation Board, supra; Davis, Admin. Law Tr. §§3A.8 and 3A.21 (1970 Supp); accord, American Mail Line Ltd. v. Gulick, 411 F.2d 696 (D.C.Cir. 1969); Sterling Drug, Inc. v. F.T.C., 450 F.2d 698, 708 (D.C.Cir. 1971).

III. Advice and Appeals Memoranda Are Not Intra-Agency Memoranda That May Be Withheld Under Exemption 5

The General Counsel's principal argument for withholding advice and appeals memoranda is that they are internal memoranda exempt from disclosure under the FOIA's fifth exemption, 5 U.S.C. §552(b)(5).11/ To bolster this argument, the General Counsel attempts to convey the impression that the advice and appeals opinions are nothing more than internal communications between attorneys investigating, evaluating, and discussing the prosecution of unfair labor practice charges. This characterization of the documents in issue, however, is simply erroneous. Advice and appeals memoranda are the "end product" of elaborate, hierarchical decision-making processes; these documents announce and explain the General Counsel's final decision as to whether he shall prosecute an unfair labor practice charge.

The General Counsel's fifth exemption argument has been made and rejected in several decided cases dealing with similar kinds of agency records. In holding that previously internal documents explaining

11/ Respondent does not seek the pre-decisional memoranda prepared by the General Counsel or his staff in advice and appeals cases. If this Court holds, as amici contend, that advice and appeals opinions are required to be disclosed, the decision would have no effect on the General Counsel's discretionary authority to withhold all preliminary, deliberative memoranda prepared in the course of deciding advice and appeals cases.

the Federal Trade Commission's reasons for approving a merger were final opinions required to be disclosed, the court commented:

> ...(T)he policy of promoting the free flow of ideas within the agency does not apply here, for private transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Sterling Drug, Inc. v. F.T.C., supra, 450 F.2d at 708.

The court went one analytical step further in the Grumman case holding that decisions of the agency's Regional Boards were "final opinions," and that, by definition, "final opinions" could not be internal memoranda, that the two kinds of records are mutually exclusive categories under the FOIA.

> Exemption 5 is simply irrelevant to final agency opinions because such opinions are decisional documents rather than pre-decisional, consultative and deliberative inter- or intra-agency memoranda. Grumman v. Renegotiation Board, supra, 482 F.2d at 710.

The court insisted that the purely factual task of distinguishing between preliminary internal memoranda and final agency decisions was to be guided by a simple principle:

> ...(A) document which a decision-maker treats as justification for a decision communicated outside the bureaucracy to regulated parties should not be shielded from public disclosure on the ground that it was originally prepared for purposes of pre-decisional consultation, because the agency has customarily not disclosed the document, or because the agency labels the document other than what it really is. Id. at 721.

See also, American Mail Line Ltd. v. Gulick, supra (pre-decisional, staff memorandum expressly relied upon in a final agency decision not exempt from disclosure); Bristol-Myers Corp. v. F.T.C., 424 F.2d 935 (D.C.Cir. 1970), cert. den., 400 U.S. 824 (1970) (documents relied upon in agency rulemaking required to be disclosed); Vaughn v. Rosen, No. 1753-72 (D.D.C. 10/9/74) (slip. op. at 5-6) (Civil Service Commission's evaluations of agencies' personnel practices not exempt under the fifth exemption). The result in each of these cases is consistent with Professor Davis' suggested accommodation between the disclosure and indexing requirements of Section (a)(2) and the exemption for internal memoranda in section (b)(5):

> I think such an accommodation calls for disclosure of all "opinions and interpretations" which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining

> what its law shall be. The need for secret communication among officials within the government should be recognized, but so should the need to prohibiting all secret law. Davis, Admin. Law Tr. §3A.21, at p.159 (1970 Supp.).

The General Counsel attempts to minimize the significance of advice and appeals memoranda as records embodying his final opinions, interpretations, and statements of policy with the suggestion that these documents are larded with privileged trial preparation materials. In the future, there is no reason why the General Counsel could not publish his formal advice and appeals decision in one document, and his internal strategy advice in another. See, Grumman v. Renegotiation Board, 425 F.2d 578, 581 (D.C.Cir. 1970). Meanwhile, insofar as existing memoranda are concerned, the district court's order below takes cognizance of the problem by allowing the General Counsel to delete settlement suggestions and names of affiants.

The General Counsel also argues, somewhat obliquely, that the advice and appeals memoranda are not "final opinions" because he is not bound to rely upon them as precedent. Professor Davis anticipated this argument and disposed of it in the following manner:

> Some opinions may have little value, but I would prefer to have all of them available and indexed than to have agencies select the ones they believe to have precedential significance. A private party who wants to know the agency's law should be entitled

> to make his own determination of what precedents have value. Id., §3A.14 at p.140.

Notwithstanding the General Counsel's protestations to the contrary, the record does indicate that prior advice and appeals memoranda are studied when a new case comes up for decision, and that prior decisions are sometimes expressly relied upon as precedent. Pet.Br., p.5. This practice strongly suggests that advice and appeals memoranda do function as operative statements of law and policy followed by the General Counsel in carrying out his responsibilities under the Labor Act. As such, the advice and appeals memoranda are records of agency law required to be made public under section (a)(2) of the FOIA.

IV. Advice and Appeals Memoranda Are Statements of Policy and Interpretations

Although not considered by the courts below, advice and appeals memoranda, separately or in combination, are "statements of policy and interpretations which have been adopted by...[the General Counsel] and are not published in the Federal Register." 5 U.S.C. §552(a)(2)(B). In every such memorandum, the General Counsel at the very least interprets the applicability of the law to the available facts in a given case. As the General Counsel testified in 1961, "the Advice Branch...concerns itself with the interpretation and application of legal principles." Op.App. 3; emphasis added. Advice and appeals decisions are also used by the General Counsel to record and communicate major and minor changes in enforcement policy. In his 1961 congressional testimony, the General Counsel

indicated that the outcome of advice cases is often affected by policy considerations, e.g.:

> (t)he general policy of the Act;
>
> (t)he ascertainable purposes of the particular statutory sections involved in the case;
>
> (t)he time and circumstances under which the issue arises in relation to the developing Board law; (This may include seeking re-examination of prior Board decisions.) Op. App. 9.

Describing the procedure by which an appeal is decided, the General Counsel testified, "When a case...involves a policy issue,... the case is discussed in detail with the General Counsel...." Op. App. 13.

Thus, in addition to being final opinions and orders in individual cases, advice and appeals memoranda are also vehicles for transmitting statements describing the General Counsel's enforcement policies as well as his interpretations of the Labor Act. Since section (a)(2)(B) requires that statements of policy and interpretations adopted by an agency be disclosed to the public, advice and appeals memoranda may not be withheld.

V. Advice and Appeals Memoranda are Instructions to Staff That Affect Any Member of the Public

Although advice and appeals memoranda are not "administrative staff manuals," they do contain "instructions to staff that affect any member of the public."

5 U.S.C. §552(a)(2)(C). Advice memoranda instruct the Regional Director either to file a complaint or to issue a dismissal letter; appeals memoranda reverse the Regional Director's original refusal and direct him to file a complaint. The General Counsel strains to suggest that, in theory, the Regional Directors could disregard the basic instructions contained in advice memoranda. Pet.Br., p.6. However, after a "careful examination of the [advice] procedure," the district court found that the Regional Director must abide by the advice decision in every case:

> ...(T)he net effect of an Advice memorandum is to truncate the delegated authority of a Regional Director to the point where his issuance of a complaint or refusal to do so is merely a ministerial function. Far from being recommendations, although ancillary recommendations may be contained therein, Advice memoranda are instructions mandatory in substance if not in form. 346 F.Supp. at 753.

The instructional effect of an appeals decision is equally mandatory, a point the General Counsel does not dispute. "Upon receipt of...the appeals memorandum, the Regional Director, unless there is a settlement, issues a complaint." Pet.Br., p.8.

In regard to the district court's holding that advice memoranda are instructions to staff affecting a member of the public, the General Counsel argues that these instructions are exempt because they pertain to law enforcement matters rather than to administrative matters.

The Senate committee report gave the following reason for the addition of the word "administrative" to an earlier bill's provision that "staff manuals and instructions" be made available to the public:

> The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action. S.Rep. 2.

Three U.S. Courts of Appeals have decided that in adding the "administrative" limitation to the "staff manuals and instructions" disclosure mandate, Congress intended to except only that law enforcement information which, if disclosed, would make it possible for law violators to avoid apprehension or the imposition of sanctions. In contrast, law enforcement manuals and instructional materials that would assist lay members of the public in obeying the law were required to be disclosed.

> Law enforcement is the process by which a society secures compliance with its duly adopted rules. Enforcement is adversely affected only when information is made available which allows persons simultaneously to violate the law and to avoid detection. Information which merely enables an individual to conform

> his actions to an agency's understanding of the law applied by that agency does not impede law enforcement and is not excluded from compulsory disclosure....
>
> Far from impeding the goals of law enforcement, in fact, the disclosure of information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law. Such clarifying information is found in agency rulings made public....It may be found in the criteria for investigative action; in standards for evaluation and so forth. Hawkes v. I.R.S., 467 F.2d 787, 795 (6th Cir. 1972) (footnote omitted); quoted with approval in Stokes v. Brennan 476 F.2d 699, 701-02 (5th Cir. 1972); accord, Davis Admin. Law. Tr. §3A.12, at p. 137 (1970 Supp.).

Most recently, the U.S. Court of Appeals for the District of Columbia Circuit, following a similar analysis, held that portions of the Defense Contract Agency Audit Manual containing "interpretations of rules and statutes or guidelines for allowability of costs" were required to be disclosed. Cuneo v. Schlesinger, 484 F.2d 1086, 1090-1091 (D.C.Cir. 1973).

Advice and appeals memoranda must be disclosed in order to provide an opportunity for "public examination of the basis for [the General Counsel's] administrative action" on unfair labor practice charges. S.Rep. 2. The disputed documents

do not contain the kind of law enforcement information that would help employers and unions circumvent their legal obligations under the Labor Act. On the contrary, advice and appeals memoranda contain the kind of information that would increase public understanding of the Labor Act's requirements, particularly as those requirements are interpreted and applied by the General Counsel.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1233

NATIONAL LABOR RELATIONS BOARD AND PETER G. NASH, GENERAL COUNSEL,

Petitioners,

vs.

SEARS, ROEBUCK AND CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE[1]

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

1. Consent of Respondent and Petitioner's statement that he will not *interpose* any objection to the Chamber's participation have been filed with this Court.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation before this Court.[2]

The question presented in the instant case, whether parties before the General Counsel of the National Labor Relations Board are entitled to disclosure of decisions which contain orders and directions controlling the disposition of their cases before the General Counsel and the Board, is an issue of particular concern to the Chamber's members who have an unsatisfied need to know the information contained in the General Counsel's Advice and Appeals decisions, since such decisions would otherwise comprise an undisclosed body of law which controls and governs their labor relations practices and policies.

Moreover, the decision of the court below, requiring the General Counsel to disclose the heretofore secret Advice and Appeals decisions, comports with the letter of as well as the sound policy underlying the Freedom of Information Act[3] and benefits not only employers, but all others—labor organizations as well as individuals—who are affected by the General Counsel's orders and directions. Because of its broad representation of a large class of those so affected and the importance to them of this issue, the Chamber believes it appropriate to present its views to this Court, in support of the decisions below.

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2. *E.g., Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.*, No. 73-1256; *Marco DeFunis, et al.* v. *Charles Odegaard, et al.*, No. 73-235; *Super Tire Engineering Company* v. *McCorkle, et al.*, No. 72-1554; *Corning Glass Works* v. *Brennan*, No. 73-29; *N.L.R.B.* v. *Bell Aerospace Company Division of Textron, Inc.*, No. 72-1598; *N.L.R.B.* v. *The Boeing Company, et al.*, 93 S.Ct. 1952; *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 517 (1971); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

3. 5 U.S.C. Sec. 552, *et seq.* (hereinafter also called the FOIA or the Act).

SUMMARY OF THE ARGUMENT

I.

Congress' purpose in enacting the Freedom of Information Act, 5 U.S.C. Sec. 552, *et seq.* was to prevent prejudice to citizens resulting from the intransigence of federal agencies in refusing to make available a body of undisclosed secret agency law governing the rights and interests of private parties involved in proceedings before those agencies. Accordingly, the Act requires agencies to disclose and make available "final opinions . . . as well as orders made in the adjudication of cases" and "instructions to staff that affect a member of the public." (5 U.S.C. Sec. 552(a)(2)(A); (a)(2)(C).)

The General Counsel of the National Labor Relations Board is conceded to be an agency within the meaning of the Act. Further, under the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, the General Counsel has the authority to finally determine whether to issue complaints based upon the unfair labor practice charges of private parties, whether to dismiss those charges, and whether to accept a pre-complaint settlement even over the objections of the charging party. Further, he has authority to frame the issues to be litigated and to decide the legal theory to be employed. The General Counsel's decisional authority in these respects is not directly reviewable under the NLRA.

Many of the General Counsel's final decisions or binding staff instructions are contained in documents known as "Advice" and "Appeal" decisions which dispose of unfair labor practice charges. These documents contain the effective law of the General Counsel and control his disposition of the case under consideration or even subsequent cases raising the same or similar issues. Thus, they are the type of final orders and instructions to staff which the Act requires to be disclosed. The General Counsel's refusal to make these documents available to

private parties so that they might know the law which controls the disposition of their cases and thus be able to fully and effectively present their theories and arguments, results in the kind of prejudice against which the Act is aimed.

II.

The exemptions contained in the FOIA are not applicable to Advice and Appeals decisions. Exemption 5 was designed to assure that memoranda reflecting individuals' deliberations or factional debates be kept confidential. However, Advice and Appeals decisions do not contain these debates or deliberations; consequently, such decisions cannot claim insulation from disclosure under exemption 5.

Exemption 7 is also inapplicable. This exemption was designed to maintain the confidentiality of investigative techniques, sources of information and statements of witnesses since their publication may retard the agency's ability to enforce the law. Advice and Appeals decisions reveal neither informants nor investigative techniques and their disclosure will in no way impede the General Counsel's ability to enforce the law. On the contrary, disclosure of these decisions containing as they do the Agency's operating law will advance the Agency's goal by encouraging knowledgable and voluntary compliance with the law.

Exemption 2 like exemptions 5 and 7 cannot immunize the requested decisions from disclosure. The second exemption was intended to insulate from publication only internal personnel rules and practices devoid of any impact upon the public. Since Advice and Appeals decisions do not contain internal personnel rules and practices, as those terms are construed by the Senate and lower courts, exemption 2 does not serve as a reliable defense to prevent disclosure.

III.

The court below after finding that the FOIA dictates disclosure of Advice and Appeals decisions required, in addition, that materials incorporated by reference in these decisions also be disclosed and that the term "circumstances of the case" sometimes found in these decisions be expanded to detail the circumstances relied upon. The court's rulings are correct; otherwise, the General Counsel by shorthand drafting could render the disclosed decisions incomprehensible and useless and the mandates of the FOIA nugatory. Furthermore, the courts guarded against any inappropriate disclosure by permitting names of witnesses that may be included in the decisions at issue to be deleted. In addition, the courts below properly ordered prompt disclosure and indexing.

ARGUMENT

I. Disclosure of the Advice and Appeals Decisions Is Mandated by Congressional Will and the Needs of the Parties

The FOIA represents Congress' broad attempt to permit access to information heretofore unnecessarily concealed from public view and reflects Congressional concern that the public must have a judicially enforceable right to obtain this information from recalcitrant government officials. The Act was a reaction to the history surrounding Section 3 of the Administrative Procedure Act, 5 U.S.C. Section 1002 which, contrary to the intent of its sponsors, came to be regarded as a statute endorsing governmental secrecy rather than disclosure. Unlike the APA, the FOIA eliminates the "properly and directly concerned" test for access to information and instead provides that official information shall be disclosed "to the public", "for public inspection". Furthermore, the agency attempting to withhold information bears the burden in an expeditious district court hearing to establish that the requested material is expressly exempt from disclosure.[4] It is now beyond

4. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973); S. Rep. No. 813, 89th Cong., 1st Sess. 3, 9, 10 (1965).

dispute that the FOIA must be construed to make available the maximum information reasonably considered to be embraced within the ambit of that Act.[5]

When the Act's policy of maximum disclosure is coupled, as in the instant case, with the genuine need of parties before the General Counsel for administrative decisions which exert impact upon those dealing with the Agency, a compelling argument for publication is presented.

It is the parties involved in agency proceedings who, even more than the general public, receive the benefits of disclosure bestowed by the Act. These parties will be most often victims of an agency's mistakes and irregularities. Unless information contained in these decisions impacting upon the public and parties before the Agency is made available to these parties, agency irregularities will go unnoticed and unremedied.[6]

5. *Sterling Drug, Inc.* v. *F.T.C.*, 450 F. 2d 698 (CA DC, 1971); *Hawkes* v. *I.R.S.*, 467 F. 2d 787 (CA 6, 1972); Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761 (1961).

6. The Senate manifested a direct concern for *parties* involved in controversies with an agency:

> "requiring the agencies to keep a current index of their orders, opinions, etc. is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies. This change *will prevent a citizen from losing a controversy with an agency* because of some obscure and hidden order or opinion which the agency knows about but has been unavailable to the citizen simply because he had no way in which to discover it . . ." (S.R. No. 813 at 7.)

The House, too, displayed its concern for the rights of plaintiffs who, when involved in agency proceedings, seek information from the agency:

> "Information sought by *plaintiffs* from Government is likely to be a perishable commodity and . . . delays . . . may result in substantive damage to *plaintiff's case*. In some circumstances, such foot-dragging in the courts can render the information totally useless, if and when it is ever made available by the Federal bureaucracy." (Emphasis added) (H.R. No. 92-1419, 92nd Cong., 2nd Sess. 2 (1972).)

Thus, Congress quite clearly foresaw and intended that the FOIA would be applied in pending matters.

In the instant case, the importance to litigants before the General Counsel of that Agency's decisions whose disclosure is at issue derives from the functions of that Agency.[7] The General Counsel of the National Labor Relations Board is congressionally charged in general with the duties to investigate allegations that the Labor Act has been violated, to determine if these charges have merit, and if so, to issue a formal complaint or to seek to remedy these violations by informal voluntary settlement. If the General Counsel decides that the charges lack merit, he is to dismiss them without hearing. The scheme of the Labor Act dictates that the Labor Board's role is restricted to reviewing only those decisions which are made following formal complaint and administrative hearing or following settlements approved by that Agency in lieu of proceeding through a hearing. Thus, the Board acts only with respect to the issues framed by the General Counsel in his pleadings and the arguments advanced by him during the hearing.[8]

Moreover, the judgment of the General Counsel in deciding whether specific conduct violates the law, in framing the issues to be litigated and in determining the appropriate relief, is final and unreviewable.[9] The unreviewable and final determinations of the General Counsel are frequently contained in the decisions whose disclosure is at issue in this case: Advice and Appeals decisions.

7. It is conceded by the Petitioner that the General Counsel constitutes an Agency.

8. This discussion omits reference to representation matters arising under Section 9 of the Labor Act, which are not perinent here, and is restricted to unfair labor practice cases arising under Sections 8 and 10.

9. *Hourihan* v. *N.L.R.B.*, 201 F. 2d 187 (CA DC, 1953), *cert. den.* 345 U.S. 930; *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Terminal Freight Cooperative Assn., et al.* v. *N.L.R.B.*, 447 F. 2d 1099 (CA 3, 1971), *reh. den.* 461 F. 2d 777, *cert. den.* 81 LRRM 2894. Under Section 3(d) of the Act, the General Counsel is conferred with ". . . *final authority* on behalf of the Board, in respect to the investigation of charges and issuance of complaints under Section 10, and in respect to the prosecution of such complaints before the Board, . . .". (emphasis supplied)

The Advice decisions represent a *"final determination . . ."* of the General Counsel, recite "facts upon which the Advice Branch relied in making its determination, the exact issue involved, instructions for the processing of the case, and detailed legal rationale including any pertinent Board or Court decisions."[10] (emphasis supplied)

It is thus apparent from the General Counsel's own acknowledgment that these decisions are binding instructions to his staff and contain that Agency's construction of substantive law, applied to the facts of the case under consideration. In these decisions the General Counsel frames the issues, directs that a complaint issue or declines to do so, and details his understanding of the applicable law. Where the decision dictates dismissal of the case, that decision is a final binding instruction to his staff unless appealed. When Advice instructs the Regional Office to issue complaint, it is the Advice Branch that has framed the issues and supplied the legal theories and construction of the law. This determination to issue complaint and litigate *only* pursuant to the theories developed by the General Counsel is final. It appears that where Advice decides to proceed to complaint and enunciates the legal theory to be employed, the charging party may appeal only to the Advice Branch of the *General Counsel* if this decision for any reason fails to consider fully the charging party's interests.[11]

10. Statement of the General Counsel submitted to the House Labor Subcommittee on the N.L.R.B. on June 29, 1961, reported at Para. 1150.01, CCH Labor Law Reports, 3076.

11. Thus, in his report on operations in 1961, the General Counsel stated following a discussion on the finality of Advice's determinations:

> "Because of the complexity or novelty of the cases submitted for advice, parties occasionally . . . seek personal conferences with the General Counsel or the Assistant General Counsel. Since it is of the utmost importance to understand fully the issues, as well as the positions of the parties in these cases, such meetings are ordinarily arranged. However, in order to avoid any semblance of ex parte proceedings, all other parties in the case are invariably and immediately notified of such meetings and are given an equal opportunity to meet with the General Counsel or the Assistant General Counsel and fully state their position." (see footnote 10)

Consequently, whether or not complaint is directed, the Advice decisions constitute final opinions and binding instructions to the staff that affect a member of the public—the party involved in the agency's proceeding.

Indeed, contrary to the General Counsel's assertion, Regional Directors are required to submit novel or important issues to Advice and are obligated to follow the determination of the Advice Branch. The record below does not disclose even a single instance where a determination by Advice was not followed. The General Counsel is, of course, bound by the record below. Since he has not demonstrated that Regional offices can resolve cases in a manner contrary to the determination of Advice or Appeals, his suggestions to this Court that Regional offices may act contrary to Advice or Appeals must be rejected by this Court. Thus, the Regional offices have absolutely no discretion to act contrary to Advice's final and binding conclusion. Further, Regional offices must issue complaints or dismiss charges in a manner wholly consonant with Advice and Appeals decisions in similar cases. (See Respondent's Brief, page 17.)

Appeals decisions, like those of Advice, constitute a final disposition of an appeal, and contain an analysis of the General Counsel's view of the substantive or procedural law and policy.[12] No further appeal lies from any decision that may be rendered by the General Counsel's Office of Appeals.

It is apparent that the nature of the requested decisions are such that non-disclosure will substantially injure parties involved in Agency proceedings. Thus, Advice and Appeals

See also, 1971 Report Labor Relations Law Section American Bar Association p. 243 (Vol. II) where the Bar concluded that parties have an opportunity to orally argue before the Advice Branch.

12. Statement of the General Counsel submitted to the House Labor Subcommittee on the N.L.R.B. on June 29, 1961, reported at Para. 1150.01, CCH Labor Law Reports, 3082.

decisions are needed: *first*, to enable a charging or charged party to protect his interests and, for example, to knowledgably evaluate terms of any proposed settlement; *second*, to adequately present an appeal to the General Counsel (such is the use of these decisions in the administrative decision underlying the instant case); *third*, to determine if the decision of the General Counsel constitutes an abuse of discretion; *fourth*, to evaluate whether the General Counsel's decision to issue complaint contains the legal theory most appropriate the interests of the public and charging party; *fifth*, to enable the charged party to know the legal theory he must combat (since there are no provisions for discovery under the Labor Act, this seems to be a reasonably claimed right). In addition and to elborate, the interests of a party who files a charge alleging a violation of the Labor Act will be critically and adversely affected if Advice and Appeals decisions in related cases are not promptly disclosed at the time the charge is filed. That is, a charging party must have access to Advice and Appeals decisions previously issued in related cases so that *during* the investigation of his charge, he may rely upon these guides and present arguments and evidence necessary to protect his interests before the General Counsel has reached a decision on the merits of his charge. Denial of access to these decisions at an early stage during the investigation will result in the charging party being unprepared and unable to argue the differences between his case and those that may be relied upon by the General Counsel. Without access to these decisions, the charging party will be unable to advance alternative theories or to show the General Counsel departed from precedent whether by accident or due to a change in Agency policy. Fundamentally, without Advice and Appeals decisions in related cases, the charging party is unaware of the nature of the evidence he need introduce in order to support the General Counsel (and a charged party does not know what evidence he must counter.) So also, without these decisions a charging party whose charge is dismissed

by the General Counsel is unable to effectively frame his appeal because he does not know the theory, arguments or case law relied upon by the General Counsel and therefore cannot be certain that he is addressing himself directly to the General Counsel's position.[13]

Further, absent access to these Agency decisions, the charging party will not be able to determine whether the General Counsel abused his discretion or disobeyed a statutory direction and thus assert the only basis he has to protest the General Counsel's refusal to issue a complaint. The FOIA thus enables a party to have access to decisions that allow a party to determine if discretion is abused.[14]

Finally, non-disclosure of these decisions will frequently prejudice a charging party should the matter go to formal hearing. Thus, the General Counsel's agents charged with prosecutorial duties are obliged to follow the decision of the General Counsel who frames the triable issues. These agents may misinterpret or misuse documentary evidence or may not recognize the full potential of available probative material or the most advantageous theory to the charging party and public. Absent disclosure of the General Counsel's theory and construction of

13. Moreover, non-disclosure of the Appeals decisions will prevent the aggrieved party from refuting or distinguishing the theories and law relied upon by the *Office of Appeals* when it closed the case, and from effectively urging his position on a request for reconsideration. In the 1961 Statement, *supra*, the General Counsel stated that while an initial decision of the Office of Appeals ordinarily closes the matter, requests for reconsideration "are entertained". In such instances, the evidence in its entirety is carefully reviewed in the light of reasons advanced by the changing party in support of his request and all interested parties are notified of the disposition of the matter. (Statement of the General Counsel submitted to the House Labor Subcommittee on the NLRB on June 29, 1961, reported at Para. 1150.01, CCH Labor Law Reports, 3082.) However, the charging party's reasons may well miss the mark if he does not know the *theories* and arguments with which he must contend, and he may consequently lose his controversy with the General Counsel. That is what Congress sought to avoid by the commands of the FOIA.

14. *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

the law both in the proceeding then being litigated and in past related cases, the primary party to the proceeding—the charging party—will lose his opportunity to maximize his litigation posture or protect his rights from deliberate or unintentional adverse acts of the prosecutor. Thus, the charging party needs Advice and Appeals decisions in order to exercise its right to convince the General Counsel to proceed on a theory more acceptable to the charging party's interests. Further, the charging party must have the opportunity afforded by disclosure of Advice decisions to determine if the field staff is following the General Counsel's directions.

A party charged with an unfair labor practice is equally at the mercy of the General Counsel's thoroughness and fairness. Unless he has access to decisions relating to issues in his case at a very early stage of the investigation and before the General Counsel has crystalized his views, he will have no real opportunity to effectively confront, distinguish or refute the General Counsel's theories, arguments and precedents that are contained in these decisions and that will be relied upon by that Agency or the Regional offices.

It is evident that the General Counsel's theories and interpretations of the labor law are contained in Advice and Appeals decisions and exert a substantial impact on the rights of litigants before that Agency. The record is devoid of any evidence that these decisions contain any reference to trial tactics or settlement directions. Consequently, disclosure will in no way impede the General Counsel's functions. Moreover, these decisions need not have precedential value for the *Labor Board* for disclosure to be mandated by the FOIA. [15] The fact that these decisions are relied upon by the *General Counsel* in issuing binding staff instructions compels disclosure to the public.

Therefore, the Agency's failure of disclosure herein violates the congressional objective to promote disclosure and to curtail

15. The Labor Board is a separate agency, not to be confused with the General Counsel.

unnecessary administrative secrecy, achieves a real but pointless injury to the private interests of the litigants and causes the public to lose the important protection to its collective interest of knowing what law governs their interests—and why.[16]

16. Indeed, since 1970 the Labor Law Section of the American Bar Association, consisting of leading members of the labor bar representing both unions and management, determined:

> "[T]hese 'precedents' [Advice and Appeals decisions] constitute precisely the kinds of 'final opinions, statements of policy and interpretations' and 'instructions to staff that affect a member of the public,' which the Freedom of Information Act contemplates should be indexed and made available to the public."

Vol. II 1970 Report, Labor Relations Law Section, American Bar Association, p. 7. The Labor Law Section has consistently adhered to this position to the present time and with regard to the instant case, has urged the General Counsel to comply fully with the decisions of the lower courts. Vol. II, 1972 Report, pp. 219:

> "The Committee also inquired with respect to requests by charging parties for advice memoranda in connection with a case that was then being submitted to the Office of Appeals. The Committee urged that such memoranda be supplied to the charging and charged parties because dismissal letters, as a rule, do not apprise the parties of the issues and rationale which led to the dismissal of the charge. . . . it still believes that there is no substitute for the basic memorandum which, in most cases, constitutes the only insight into the law and policy governing the case."

See also, Vol. II, 1973 Report, p. 244. In the 1974 Committee Reports, pp. 249-250 the Committee said:

> ". . . your Committee continues to adhere to the view that where documents are expressly incorporated by reference in memoranda, they should be produced (see 1973 Committee Report, p. 4A). Moreover, where memoranda rely upon 'circumstances of the case' or some other vague, imprecise, or undelineated reference, explanatory materials should also be made available. Finally, we believe that the General Counsel should not delete material without fully explaining or justifying the basis for such deletion." (p. 250)

The lower court's orders are consonant with the view of the Labor Law Section and they do not delve into the decisional processes—the agenda system of confrontation and discussion—but only direct the production of ". . . the end product . . ." (H. Rep. No. 1497, 89th Cong., 2nd Sess., p. 7 (1966)) of that agenda process—the General Counsel's resultant final law.

On a quarterly basis the General Counsel does publish a summary of a few cases which he deems to be of unusual interest. Of the

II. The Act's Standards for Disclosure Are Satisfied.

The resolution of the issues of disclosure in this cause turns upon whether the Advice and Appeals decisions are final orders or binding staff instructions affecting the public as the Chamber and Respondent contend, or whether they are exempted intra-agency communications, parts of investigatory files or internal personnel rules or practices, as the General Counsel claims.[17]

A. *Exemption 5: Intra-Agency Memoranda*

Two reliable guides have been developed to aid in determining whether the decisions requested here are required to be disclosed or instead fall within the ambit of exemption 5. First, decisions reflecting agency policy and its view of the law are disclosable. Such documents are the agency's end product and represent its opinions or interpretations of law and policy.[18] On the other hand, documents containing factional debates or individuals' deliberations as the agency strives to formulate its policy or interpretation of the law may be kept confidential. These criteria reflect the design of the fifth exemption which dictates that officials should be judged by their decisions rather

hundreds of other cases coming within his jurisdiction nothing is published. See, *e.g., Columbus Building & Construction Trade Council, AFL-CIO, et al. (The Chamber of Commerce of the United States of America)* Cases Nos. 9-CC-706-2 thru -20. (A. 1) There is no justification to refuse to disclose other Advice and Appeals decisions simply because the Agency does not deem them to possess unusual interest.

17. Under the design of the FOIA, an agency must bear a weighty burden when it seeks to delimit disclosure of requested readily identifiable documents. *Bristol-Myers* v. *F.T.C.*, 424 F.2d 925 (CA DC, 1970).

18. *Sterling Drug, Inc.* v. *F.T.C., supra,* where the court stated: "[P]rivate transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it." *Id.* at 708.

than by the matters they examined before reaching their conclusions.[19]

Viewed against these tests, it is apparent that Advice and Appeals decisions are disclosable. Advice and Appeals decisions, as stated, *supra,* constitute the General Counsel's final opinions, construction of substantive and procedural law and/or mandatory staff instructions.[20]

Furthermore, as demonstrated by the Respondent, neither Advice nor Appeals decisions contain the internal debates or disputes of staff members that precede the determination of the General Counsel's policy and the formulation of his view of the law. Therefore, production of these documents will not in any manner stifle the deliberative process, and there is no need to immunize them from disclosure by exemption 5.

In sum, the requested decisions not only enunciate Agency policy and its construction of the law, (rather than individuals' debates or opinions) but in addition dictate final and ultimate Agency action. Exemption 5 is thus clearly inapplicable.[21]

B. *Exemption 7: Investigatory Files*

Notwithstanding that the crux of Advice and Appeals decisions represents the General Counsel's position on substantive law, that Agency now asserts that this operating law can be

19. Congressional Commentaries demonstrate that Exemption 5 was designed to encourage frank deliberation before the agency's policy was formulated. S. Rep. 813, 89th Cong., 1st Sess. 3 (1965). The courts and commentators have found similar objectives. *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board,* 482 F. 2d 710, 718 (CA DC, 1973) cert. granted No. 73-1316; argument set in tandem with the instant case. *Soucie* v. *David,* 448 F. 2d 1067 (CA DC, 1971). Davis, *The Information Act: A Preliminary Analysis,* 34 U. Chi. L. Rev. 761, 797 (1961).

20. *Hawkes* v. *I.R.S., supra.* Professor Davis has stated that the Act "calls for disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy . . .". Davis, *The Information Act: A Preliminary Analysis, supra* at 797.

21. *Administrative law—1973,* 1974 Duke L. J. 251, 271.

withheld from the public as a part of Agency investigatory files. However, this contention must fail inasmuch as exemption 7 was not designed to insulate from disclosure an agency's effective law and policy.

Rather, exemption 7 was intended for the limited purpose of maintaining the confidentiality of investgiative techniques, sources of information and statements of witnesses.[22] These matters may be kept confidential when their revelation would impede or defeat law enforcement. Accordingly, interrogation techniques, mechanics of an FBI stake-out and selective enforcement policies necessary due to a lack of personnel may be immune from disclosure, since publication would retard the law enforcement responsibility of the agency.[23] On the other hand, documents that reflect the agency's "end product" and reveal the agency's position on substantive or procedural law, such as Advice and Appeals decisions, must be disclosed under the terms of the FOIA. Advice and Appeals decisions represent the Agency's "basis for administrative action" rather than traditional confidential instructions, and accordingly are subject to "public examination" even though the General Counsel may perform investigative and prosecutorial functions. S. Rep. No. 813, 89th Cong., 1st Sess. (1965), p. 2. Such decisions, when made public, would aid law enforcement, rather than frustrate it, by encouraging knowledgable compliance with the Agency's law.[24] In short, since it is conceded that the requested decisions reveal neither informants nor investigative techniques, exemption 7 does not foreclose their publication.[25]

22. *Aspen* v. *Department of Defense*, 491 F. 2d 24 (CA DC, 1973); *Evans* v. *Department of Transportation*, 446 F. 2d 821 (CA 5, 1971) *cert. denied* 405 U.S. 918 (1972).

23. *Hawkes* v. *I.R.S., supra; Stokes* v. *Brennan*, 476 F. 2d 699 (CA 5, 1973).

24. *Stokes* v. *Brennan, supra; Administrative Law—1973*, 1974 Duke L. J. at 282. There, at note 169, Professor Davis reasons that I.R.S. guidelines for staff in auditing of tax returns should be disclosed to the extent they reveal the position of the I.R.S. on questions of tax law.

25. See Respondent's Brief page 15. The General Counsel has failed in his burden to show below that the requested decisions contain informants or investigative techniques. Consequently, any assertion that investigative matters or techniques will be revealed if disclosure is ordered should be rejected by this Court. Moreover, the placement of these decisions in Regional office files cannot forestall publication of the Agency's operating law. The policies of the FOIA may not be flouted by this device.

Exemption 2: Internal personnel rules and practices

Exemption 2, like exemptions 5 and 7, may not insulate the requested decisions from public disclosure. Exemption 2 was designed to protect from disclosure only documents pertaining to employer-employee concerns which have no impact upon the public.[26] Furthermore, a review of precedents yields the conclusion that lower courts have consistently applied a narrow construction to this exemption. Thus, the words "internal" and "personnel" have been found to modify both "rules" and "practices".[27]

This judicial construction of exemption 2 is consonant with the Senate's understanding of that exemption's scope. That is, commenting on this exemption, the Senate said that internal personnel rules and practices includes parking regulations, lunch schedules and sick leave policies.[28] Thus, the courts and the Senate have limited the reach of exemption 2 to matters wholly devoid of impact upon the public.

While the House commentaries purport to include staff manuals within the ambit of this exemption, this interpretation has

26. *Hawkes* v. *I.R.S., supra.* According to that court, examples of materials exempt from disclosure under the second exemption include the amount of time an employee is to devote to his work and instructions concerning an employee's use of his employer's equipment.

27. *Consumers Union of United States, Inc.* v. *V.A.*, 301 F. Supp. 976, 800 (S.D.N.Y.), appeal dismissed because moot 436 F.2d 1363 (CA 2, 1971); *Benson* v. *G.S.A.*, 289 F.Supp. 590, 594 (W.D. Wash., 1968), aff'd on other grounds, 415 F.2d 878 (CA 9, 1969). In addition, note: *The Freedom of Information Act: A Seven Year Assessment*, 74 Col. L. Rev. 895, 957 (1974), hereinafter, FOIA Assessment.

28. S. Rep. No. 813, *supra* at 8.

been criticized by Professor Davis[29] and in addition conflicts with other portions of the FOIA which in general require disclosure of instructions to staff.[30]

It is apparent that if exemption 2 is to fit within the overall design of the FOIA, it must have been intended to have only the narrow reach attributed to it by the Senate and the lower courts. The House view conflicts with portions of the FOIA and is antithetical to the Act's disclosure mandates.[31]

Viewing the content of the requested decisions against the background of Senate commentaries on and judicial construction of exemption 2, it is apparent that these decisions do not contain "internal personnel rules and practices" and are not insulated by that exemption from disclosure.

III. The District Court Properly Required That Complete Advice and Appeals Decisions Be Produced.

As Respondent stated (Brief 26-28) the drafters of Advice and Appeals decisions often employ shorthand terms such as the "circumstances of the case", or refer to documents which are incorporated by reference.

29. Davis, *Administrative Law Treatise* (1970 Supp.) Section 3 A.9, 3 A.31.

30. Pursuant to subdivision (a)(2)(c), staff manuals or memoranda containing the agency's interpretation of substantive or procedural law are subject to disclosure. Indeed, courts have immunized these documents from disclosure only where publications may retard the agency's goals by enabling "law violators to escape detection." *Hawkes* v. *I.R.S.*, *supra* at 795. Thus, as stated *supra*, staff instructions concerning investigative methods may be kept confidential. However, instructional manuals or memoranda containing the agency's view of the law must be disclosed since voluntary and knowledgeable compliance with the law will thereby be encouraged and the agency's goals advanced. *Hawkes* v. *I.R.S.*, *supra* at 795. *Stokes* v. *Brennan*, *supra*, at 702. Note: *FOIA Assessment*, *supra* at 904.

31. The House report was drafted only under heavy agency pressure after the FOIA had passed the Senate on the basis of a committee report that was faithful to the words of the bill. Davis, *Administrative Law Treatise* (1970 Supp.) Section 3 A.31.

It is apparent that documents incorporated by reference in Advice or Appeals decisions must be disclosed and that conversely, the Agency may not, be efficient drafting, insulate these incorporated documents from disclosure. A decision in an Advice or Appeals document that turns upon the construction of a contract clause, for example, is meaningless unless the contract term as well as the decisional document is disclosed. Furthermore, the technique of relying upon the "circumstances of the case" without publishing those circumstances renders the decisions meaningless and the mandates of the FOIA nugatory.[32]

Accordingly, when the General Counsel resorts to shorthand terms or incorporates material by reference in decisional or instructive documents, he must not only publish these decisions, as discussed above, but also disclose the "circumstances" relied upon and the incorporated material as well.[33]

IV. Disclosure Must Be Prompt with Decisions Properly Indexed.

It is apparent that the mandate to disclose will be nugatory unless it is accompanied with an order requiring that the disclosure be promptly accomplished and that the decisions be indexed in a useful fashion. A subject matter index would be most useful and effectuate the policies of the Act. In the most recently adopted amendments to the FOIA, Congress required both expeditious disclosure and indexing. (5 U.S.C. Section 552(a)(a), 552(a)(4)(d), 552(a)(6).) Thus, Congress dem-

32. See the 1974 Report, Labor Relations Law Section, American Bar Association, 250, footnote 16, *supra*.

33. There is no need to produce investigatory files to comply with the disclosure requirement urged in the text above. Indeed, the District Court below did not order the production of these files. That court instead permitted the General Counsel to select the method to be used to supply facts missing from Advice and Appeals decisions where the presentation of these facts was necessary for a complete understanding of these documents. The district court below also permitted a deletion of affiant's names from decisional documents and did not require the production of witnesses' affidavits or other matter "exempt under the Act."

onstrated a continuing preoccupation with the public's right of access to hitherto confidential information.[34]

CONCLUSION

For the reasons set forth above, and those in Respondent's brief, it is respectfully requested that the judgments of the courts below be affirmed.

Respectfully submitted,

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34. In addition, in *Automobile Club of Missouri* v. *National Labor Relations Board, et al., Appellants, Chamber of Commerce of the United States, Intervenor,* ..... F. 2d ..... (1973) 84 LRRM 2423 (1973), where indexing of representation cases was ordered by the lower court, the Petitioner did not appeal this order to this Court.

The 1970 Report, Labor Relations Law Section, American Bar Association, Vol. II, p. 9, states:

> "However, your Committee believes the Board's obligations under the Freedom of Information Act cannot be indefinitely delayed and that, in accordance with Congressional will expressed in the Act, the Board should immediately undertake the preparation of an index and other suitable procedures for public access to the *Advice and Appeals Memoranda.*"

APPENDIX

NATIONAL LABOR RELATIONS BOARD
Office of The General Counsel
Washington, D.C. 20570

PICKETING TO OBTAIN 8(e) PROVISO AGREEMENTS IN CONSTRUCTION INDUSTRY

A number of cases have raised the issue of whether a construction union violates sections 8(b)(4)(A) and/or 8(e) when it seeks or obtains by picketing an otherwise valid on-site construction subcontracting clause under the 8(e) proviso from a contractor who does not himself employ employees of the craft represented by that union.

The contentions of the Charging Parties as well as a number of arguments developed by the General Counsel's office itself, have been considered in detail as has been the recent decision of the Fifth Circuit Court of Appeals in the *Connell* case.[1] The General Counsel has concluded, for the reasons discussed fully below, that there is not sufficient basis to authorize complaint in these cases.

While not directly attacking the Board's holding in *Centlivre,*[2] it has been contended that an agreement entered into by or sought between the contractor and the union is not within the privilege of the construction industry proviso to Section 8(e), and that the union's conduct to obtain the agreement accordingly violated the Act, because the contractor did not employ employees

1. *Connell Construction Company* v. *Plumbers & Steamfitters Local No. 100,* 5th Circuit, 72-1243, August 23, 1973.

2. *Northeastern Indiana Building and Construction Trades Council, et al. (Centlivre Village Apartments),* 148 NLRB 854, enforcement denied on other grounds, 352 F.2d 606 (C.A. D.C.).

of the craft represented by the union and had no collective-bargaining relationship with the union.[2a]

As the initial point of departure, the Board's decision in *Centlivre, supra,* which has been uniformly followed since its decision ten years ago, is now settled law for the General Counsel. The Board there accepted the view of all those Circuit Courts of Appeal which had passed on the issue[3] and had uniformly rejected the Board's prior view.[4] The Board in *Centlivre* held, as had the Courts, that a union's strike to *obtain* an agreement which would be privileged under the construction industry proviso did not violate Section 8(b)(4)(A).[5]

2a. Alternatively, it is argued that, although the agreement may be privileged under the 8(e) construction proviso, the absence of a collective-bargaining relationship between the contractor from whom the agreement is sought and the union seeking the agreement, renders economic action by the union violative of Section 8(b)(4)(A). However, the Board has made it clear that picketing to obtain such a clause is not violative of Section 8(b)(4)(A), if the clause is within the construction proviso. (See e.g. fn. 19, *supra.*) Thus the basic issue remains whether the sought-after clause comes within the proviso.

3. *Construction, Production & Maintenance Laborers Union, Local 383, et al.* v. *N.L.R.B. (Colson and Stevens Construction Co.),* 323 F.2d 422 (C.A. 9); *Essex County and Vicinity District Council of Carpenters and Millwrights, United Brotherhood of Carpenters, etc. (Associated Contractors of Essex County, Inc.)* v. *N.L.R.B.,* 332 F.2d 636 (C.A. 3); *Orange Belt District Council of Painters No. 48, AFL-CIO, et al. (Calhoun Drywall Co.)* v. *N.L.R.B.,* 328 F.2d 534 (C.A. D.C.). See also *Local Union No. 48 of Sheet Metal Workers* v. *Hardy Corp.,* 332 F.2d 682 (C.A. 5).

4. The Board's prior view set out in *Colson and Stevens,* 137 NLRB 1650, was that only voluntary agreements were within the construction industry proviso to Section 8(e).

5. Section 8(b)(4)(A) of the Act, as amended by the Landrum-Griffin Act of 1959, makes it an unfair labor practice for a union to induce employees to strike or to threaten, coerce or restrain any person where an object is:

> (A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e).

Section 8(b)(4)(B) could nevertheless, as in *Centlivre* itself, be violated if the union's conduct sought the breaking of an existing business relationship at the site of construction, i.e., had an immediate cease doing business object.

The Board there stated:

> Subsequent to the issuance of *Colson and Stevens,* however, United States Courts of Appeals for three separate circuits have considered and uniformly rejected the above analysis and conclusion. In essence these cases hold that the Board failed to give sufficient scope to the construction industry proviso to 8(e).

In view of the Centlivre holding, the Section 8(b)(4)(A) and Section 8(e) issues of the instant cases turn on whether the agreement entered into or sought between the contractor and the union would violate Section 8(e) for the reasons urged by the Charging Parties.

Section 8(e) provides in pertinent part:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work. . . ."

Since the Union here is a "labor organization" and the contractor "an employer in the construction industry," and since their agreement is confined to the work to be done at the site of construction, the agreement clearly comes within the language of the proviso to Section 8(e). Left then are the contentions of the Charging Parties that there are two alternative implicit preconditions to the validity of an agreement otherwise within the construction industry exemption: (1) that there be

an existing collective-bargaining relationship between the parties to the agreement; or (2) that the employer party employ employees doing the kind of work covered or to be covered by the agreement. These contentions are now considered.

While recognizing that a proviso to a general statutory prohibition is to be narrowly construed, the contentions of the Charging Parties cannot be considered on mere axioms of interpretation since the purpose and scope of the construction industry proviso has been the subject of substantial Board and Court litigation in the almost 15 years since its enactment.

The issues here raised involve, of course, a "*secondary*" agreement to be applied to work at a site of construction and not a primary agreement.[6]

> "However, provisos were added to § 8(e) to preserve the *status quo* in the construction industry, and exempt the garment industry from the prohibitions of §§ 8(e) and 8(b)(4)(B). This action of the Congress is a strong confirmation that Congress meant that both §§ 8(e) and 8(b)(4)(B) reach only secondary pressures. If the body of § 8(e) applies only to secondary activity, the garment industry proviso is a justifiable exception which allows what the legislative history shows it was designed to allow,

6. The distinction from cases involving "primary" objects such as union recognition sought through direct (picketing) pressure on an employer is set out in the Court's decision in *Dallas Building Trades Council* v. *N.L.R.B.*, 396 F.2d 677, 682 (C.A. D.C.):

> The Board's responses to these arguments are, however, convincing. First, there is no inconsistency between the Board's interpretation of Section 8(b)(7) and the purposes of Section 8(e). It simply does not follow from the fact that the agreement would be lawful if voluntarily adopted that a labor organization can employ illegal means to obtain it. *Sections 8(b)(7) and 8(e) are aimed at wholly different problems.* And the proscriptions of Section 8(b)(7) do not vary with the legality of the agreement sought. Picketing to obtain a wage agreement, for example, is no more lawful than picketing to obtain a hot cargo clause. (Emphasis supplied.)

See also *Building and Construction Trades Council of Philadelphia and Vicinity (Samuel E. Long, Inc.)*, 201 NLRB No. 42, 1973, enfd. 485 F.2d 680 (C.A. 3, 1973).

> secondary pressures to counteract the effects of sweatshop conditions in an industry with a highly integrated process of production between jobbers, manufacturers, contractors and subcontractors. First, this motivation for the proviso sheds light on the central theme of the body of § 8(e), from which the proviso is an exception. Second, if the body of that provision and § 8(b)(4)(B) were construed to prohibit primary agreements and their maintenance, such as those concerning work preservation, the proviso would have the highly unlikely effect, unjustified in any of the statute's history, of permitting garment workers, but garment workers only, to preserve their jobs against subcontracting or prefabrication by such agreements and by strikes and boycotts to enforce them. Similarly, the construction industry proviso, which permits 'hot cargo' agreements only for jobsite work, would have the curious and unsupported result of allowing the construction worker to make agreements preserving his traditional tasks against jobsite prefabrication and subcontracting, but not against nonjobsite prefabrication and subcontracting. On the other hand, if the heart of § 8(e) is construed to be directed only to secondary activities, the construction proviso becomes, as it was intended to be, a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there,[32] but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other. The provisos are therefore substantial probative support that primary work preservation agreements were not to be within the ban of § 8(e)." (At 637-639)

"32. See *Essex County and Vicinity Dist. Council of Carpenters* v. *Labor Board*, 332 F.2d 636 (C.A. 3d Cir. 1964); Comments, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L.J. 673, 684-689 (1951)."

The Court's statement has, of course, pointed significance concerning both the legislative purpose underlying the construc-

tion industry proviso and the contentions of the Charging Parties here. Thus the Court, as noted above, stated that the proviso was:

> ". . . intended to be, a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there,[32] but to ban any secondary objective agreements concerning non-jobsite work, in which respect the construction industry is no different from any other."

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32. *supra.*

The Court's citation at footnote 32 to the Third Circuit's decision, *Essex County, supra,* amplifies the meaning of "close community of interests" at the construction site,[7] which underlies the exemption.

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7. The Court's citation of the Yale Law Journal Comment is equally significant. That Comment, published shortly before the Supreme Court's decision in *Denver Building,* expressed, at the pages cited, disagreement with the Board's finding of violation in the case because of the relationships at a construction site. On page 689 of the Comment this view is set forth as follows:

> "The general contractor in the construction industry is in a significantly different position. Unlike B, in the example above, the general contractor's own labor policies are the reason his place of work is being picketed. For he has brought onto the job a non-union subcontractor. This, as Judge Clark pointed out in his dissent in the *Electrical Workers* case, is immediate cause of the dispute. For purposes of 8(b)(4)(A) all the men working on the job should be considered the general contractor's employees; he should not be allowed to insulate himself from the effects of having non-union men work side by side with union men simply because the custom and structure of the industry places a subcontractor between him and direct employment of the non-union men. In other words, the test should be whether the direct employer of the non-union men (the subcontractor) is sufficiently closely connected both geographically and economically with the direct employer (the general contractor) so that the labor policies of the one may be attributed to the other. The contractor-subcontractor relationship in the construction industry should be held to satisfy this test.
>
> The general contractor, however, should be regarded as the employer of a subcontractor's employees only for purposes of that job where the two contractors are working together. Therefore, although a construction union trying to organize any subcontractor on a project should have the right to picket the entire project, it should not be permitted to extend its activity to other sites on which the picketing is to organize a particular job, the geographical boundaries of that job should mark the confines of the dispute.

8. 361 F.2d 547, 551 (C.A. D.C., 1966).

9. Justices Douglas and Reed.

The Third Circuit had explained it as follows:

> This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project. (At p. 640.)

This view of the proviso's purpose is also set forth in *Drivers Local 695* v. *N.L.R.B.*,[8] where the Circuit Court, in pertinent part, stated:

> "The purpose of the Section 8(e) proviso was to alleviate the friction that may arise when union men work continuously alongside non-union men on the same construction site.[22]

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22. See *Essex County & Vic. District Council of Carpenters, etc.* v. *N.L.R.B.*, 332 F.2d 636, 640 (3rd Cir. 1964); *N.L.R.B.* v. *Denver Bldg. & Const. Trades Council,* 341 U.S. 675, 692, 71 S. Ct. 943, 95 L. Ed. 1284 (1951) (Douglas J. dissenting); Comment, *Hot Cargo Agreements Under the National Labor Relations Act: An Analysis of Section 8(e),* 38 N.Y.U.L. Rev. 97, 111 (1963); Comment 45 Cornell L.Q. 724, 753 (1960).

And the dissent[9] in *Denver Building,* referred to in *Drivers Local 695,* stated:

> "The employment of union and nonunion men on the same job is a basic protest in trade union history. That was the protest here. The union was not out to destroy the contractor because of his antiunion attitude. The union was not pursuing the contractor to other jobs. All the union asked

was that union men not be compelled to work alongside nonunion men on the same job. As Judge Rifkind stated in an analogous case, 'the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it.'[1]

"The picketing would undoubtedly have been legal if there had been no subcontractor involved—if the general contractor had put nonunion men on the job. The presence of a subcontractor does not alter one whit the realities of the situation; the protest of the union is precisely the same. In each the union was trying to protect the job on which union men were employed. If that is forbidden, the Taft-Hartley Act makes the right to strike, guaranteed by § 13, dependent on fortuitous business arrangements that have no significance so far as the evils of the secondary boycott are concerned. I would give scope to both § 8(b)(4) and § 13 by reading the restrictions of § 8(b)(4) to reach the case where an industrial dispute spreads from the job to another front.[2]

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1. *Douds* v. *Metropolitan Federation*, 75 F. Supp. 672, 677.

2. See the opinion of Judge Fahy below, 87 U.S. App. D.C. 293, 186 F.2d 326; and the dissenting opinion of Judge Clark, *International brotherhood* v. *N.L.R.B.*, 181 F.2d 34, 40.

It seems clear from the foregoing, even before proceeding to consideration of the relevant Board decisions from *Centlivre* to the present, that the construction industry proviso has been recognized as privileging what may be characterized as "Denver Building Agreements" confined to the site of construction. That is, while the Supreme Court decision in *Denver Building* was not overruled,[10] *agreements* covering *Denver Building* relation-

10. That *Denver Building* was not "overruled" by the Supreme Court's decisions in *General Electric*, 366 U.S. 667, and *Carrier*, 376 U.S. 492, is fully set forth in the Board's decision in *Markwell and Hartz*, 155 NLRB 319, enfd. 387 F.2d 79 (C.A. 5); see also 383 F. 2d 562 (C.A. 6). *Markwell and Hartz*, however, gives no support to the contentions of the Charging Party concerning construction industry on-site *agreements*.

ships at a construction site were exempted from the prohibition of Section 8(e).[11]

In sum then, since the construction industry proviso deals with "secondary" agreements, the "community of interest" involved is not tied to concepts of "unit work preservation" but rather to interests of those doing work (or business) at the jobsite. And based on this interest Congress permitted agreements there which, being "secondary" would otherwise and elsewhere be prohibited.

The legislative history supports this view. As pointed out by the Board in *Centlivre* at footnote 17:

> "The intent of Congress to retain the then existing law in connection with secondary boycotts in the construction industry is apparent from the following statement by the House conferees:
>
> > *"The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project,* or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* cases *(Local 1976, United Brotherhood of Carpenters (and Joiners of America, AFL, et al. (Sand Door & Plywood Co.))* v. *N.L.R.B.*, 357 U.S. 93 (1958)). *To the extent that such agreements are legal today under Section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by Section 8(e). The pro-*

11. *Denver Building* itself points away from the Charging Parties' contentions. Thus it appears that the neutral general contractor there, Doose and Lintner, did not employ electricians but, rather, subcontracted electrical work to the primary nonunion electrical contractor, Gould and Preisner. Indeed the Supreme Court, in rejecting the Union's contention that it had a primary dispute with Doose and Lintner in seeking to force Doose and Lintner to make the project an all-union job, pointed out that "If, for example, Doose and Lintner had been doing all the electrical work on this project through its own nonunion employees, it could have replaced them with union men and thus dispose of the dispute." (At p. 688.)

> *viso applies only to Section 8(e)* ar 1 therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* case and the *Moore Drydock* cases would remain in full force and effect. The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project. Restrictions and limitations imposed upon such picketing under present law as interpreted, for example, in the U.S. Supreme Court decision in the *Denver Building Trades* case would remain in full force and effect. . . . House Conference Report on Labor-Management Reporting and Disclosure Act of 1959, House Report 1147, 86th Cong., 1st sessions, pp. 39-40." (Emphasis supplied with respect to portions bearing on "agreements.")

This is supported further by the statements of Senators Kennedy and Goldwater in the legislative history. Senator Kennedy explained the 1959 amendments as follows:

> *"The first proviso under new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law* with respect to picketing at the site of a construction project and *with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.*
>
> *"This proviso affects only section 8(e)* and therefore leaves unaffected the law developed under section 8(b)(4). The Denver Building Trades (341 U.S. 675) and the Moore Drydock (92 N.L.R.B. 547) cases would remain in force.
>
> *"Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them.*[12] Since the proviso does not relate

12. Relied on by the Board in *Carvel*, 152 NLRB 1672, discussed below.

> to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the Sand Door case (357 U.S. 93) is applicable.
>
> "It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.
>
> "It should be particularly noted that *the proviso relates only to 'contracting or subcontracting of work to be done at the site of the construction.'* The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite. [II Leg. Hist. Act of 1959, 1433(3).]" (Emphasis supplied.)

And Senator Goldwater stated:

> *"There is a further exemption from the prohibitions against 'hot cargo' agreements only, under section 8(e), with respect to a segmetnt of the building construction industry and the labor unions representing employees in that segment of the industry. This exemption is granted only where the employer with whom such an agreement is signed is in the construction industry and engages only in construction work at the site;* it does not apply where the employer, although in the construction industry, is not engaged in construction work at the site such as enterprises primarily engaged in supplying or transporting building construction materials. *Where an employer falls into this limited category, it is not an unfair labor practice for such employer and a labor union to enter into an agreement* whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of another employer, or to cease doing business with any other person, and *such an agreement is not per se unlawful.* Unlike the exemption for the apparel and clothing industry, the prohibitions of the secondary boycott ban in section 8(b)(4), as amended, are however, applicable to these situations.
>
> "Thus, although *employers and unions who are under this exemption may lawfully enter into such agreements,* and

> may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint —economic or otherwise—may be used by any party to such an agreement, even if entered into voluntarily by both parties, to compel the other party to live up to the contract or to refrain from breaching it." [II Leg. Hist. (1959) 1858(1)] (Emphasis supplied.)

Turning now to consideration of relevant Board law from *Centlivre* to the present, the Board decisions provide no support, but rather undercut, the contentions of the Charging Parties.[13] In *Centlivre* itself, the Board, in accepting the view of the Circuit Courts which had "uniformly rejected" the prior Board view, stated: "in essence these [Court] cases hold that the Board failed to give sufficient scope to the construction proviso to Section 8(e)." The Board then treated the clauses there involved as within the construction industry proviso to Section 8(e).[14] And the facts of *Centlivre* run contrary to the contentions of the Charging Party here. The Respondent Unions there included a Construction Trades Council and affiliated locals, including Painters, Laborers, Carpenters, Plumbers, Sheet Metal Workers, Iron Workers, and Electrical Workers. Also Respondent was a Bricklayers Local. The Respondent Unions

13. *Building Material & Construction Teamsters Union Local No. 216 (Bigge Drayage Co.)*, 198 NLRB No. 130, and *General Teamsters Local 386 (Construction Materials Trucking, Inc.)*, 198 NLRB No. 129, cited on appeal for the proposition that such agreements are secondary in nature and therefore illegal, are not in point because they do not relate to on-site work.

14. The Board in footnote 11 of its decision stated:

> "Neither the General Counsel nor the Charging Party disputes the proviso's application to the clauses in question. Accordingly, there being no issue before us as to the validity of such clauses, we assume, for purposes of this case, that they are within the proviso and lawful.

There is no indication, however, that this reservation had any relationship to the factors argues for by the Charging Party in the instant case. (See discussion of *Colson and Stevens* below.) Rather, it appears that the reservation is related to "self-help" issues decided shortly thereafter by the Board in *Muskegon*, 152 NLRB 360, since the clauses in *Centlivre* did contain "self-help" provisions. See *Centlivre, supra*, at p. 861.

sought from Centlivre, a general contractor, the "secondary" clauses set forth on p. 861 of the Board decision. These agreements would have required of Centlivre that only signatories to a contract with Respondent Unions would be permitted to work on the construction site.[15] As set out in the Trial Examiner's decision:[16]

> "As general contractor, Centlivre itself employed 6 to 9 laborers, carpenters, and cement finishers. It subcontracted particular craft operations to various firms in the Ft. Wayne area."

Centlivre had no collective-bargaining contract or relationship with the Respondent Unions. And since Centlivre employed only laborers, carpenters and cement finishers, the subcontracting agreement restrictions would have applied to work of a kind Centlivre's own employees did not perform. Thus it is entirely clear that the elements contended for by the Charging Parties in the instant cases as determinative for the validity of an on-site agreement under the construction industry proviso were absent in *Centlivre* and the Board, nevertheless, treated the clauses as within the construction industry proviso.

Significant too is the fact that in *Colson and Stevens* itself (where the facts were very like those in the instant case) the factors the Charging Parties here contend to be preconditions to proviso validity did not exist. That is, Colson had no collective-bargaining agreement or relationship with the Unions there involved and the subcontracting agreement sought covered work which employees of Colson did not perform. Thus the Unions there (Carpenters and Laborers) sought to compel Colson to grant recognition covering carpenters whom he did employ. But the Unions also sought an agreement with secondary subcontracting restrictions concerning any work Colson subcontracted and not confined to carpentry work.[17] The Board, based on its pre-*Centlivre* view that only *voluntary* agreements

15. *Supra*, p. 856 and fn. 13.

16. *Supra*, p. 859.

17. See *Colson, supra*, at p. 1650 and 1651, and fn. 1.

were within the construction industry proviso to Section 8(e), found a violation on that basis. There is no scintilla of suggestion in the Board's decision that, had the subcontracting agreement sought by the Unions been "voluntarily" entered into, the Board might nevertheless have viewed the agreement as outside the construction industry proviso. So the underlying relevant facts of *Colson and Stevens,* just as in *Centlivre,* are at odds with the contentions of the Charging Parties here.

The Board's holding in *Church's Fried Chicken,* 183 NLRB No. 102, on the facts there, is also directly contrary to the contentions of the Charging Parties. While finding a violation of Section 8(b)(7)(C) of the Act, the Board, upon exceptions filed, affirmed the dismissal of the 8(b)(4)(A) and (B) allegations of the complaint. This was based on the Trial Examiner's full discussion of the Section 8(b)(4) issues. Thus the Trial Examiner pointed out that a violation of Section 8(b)(4)(A) would require a finding that the Union was attempting to have Church sign an agreement violative of Section 8(e). And this entailed a determination whether Church was "an employer in the construction industry." Upon concluding, after discussion of the legislative history, that Church was such an employer, the Trial Examiner found that the agreement which the Union sought would not have been violative of Section 8(e) because of the construction industry proviso, and in consequence, no violation of 8(b)(4)(A) could be found. As pointed out by the Trial Examiner "Church, instead of employing a general contractor, acted as its own prime contractor through . . . its construction superintendent." It is clear that Church had no collective-bargaining agreement or collective-bargaining relationship with the Respondent Building Trades Council, nor did Church directly employ employees of the crafts which might be represented by affiliates of the Respondent Building Trades Council.[18] The holding in *Church's Fried Chicken* then also negates the Charging Party's contention.

18. With the possible exception of a laborer. See p. 3 of Trial Examiner's Decision.

The Board's post-*Centlivre* decisions giving broad scope to the proviso also militate against the Charging Parties arguments. Thus in *Muskegon,* 152 NLRB 360, the Board considered the validity under Section 8(e) of the following clause:

> "It is agreed that the members of Bricklayers Local Union No. 5 may refuse to work on any job where *any of the work, irrespective of craft,* is performed, has been performed, or is to be performed by craftsmen who enjoy less favorable *wages and working conditions* than is provided in the *current collective-bargaining agreement between the equivalent* Muskegon County Building Trades *Local Union and its contracting employers.* Such refusal shall not be grounds for discharge or other disciplinary action, but shall be regarded as a failure of the employer to provide suitable work." (Emphasis supplied.)

As emphasized in the Board decision itself, the clause permitted a strike by members of the Bricklayers Union where *any of the work irrespective of craft,* is, has, or is to be performed by craftsmen who enjoy less favorable wages and working conditions than is provided in the current collective-bargaining agreement *between the equivalent Building Trades Union and its contracting employers.* The Board, in a detailed discussion, held the clause to be within the ambit of Section 8(e) and beyond the construction industry exemption solely because of the self-help feature which the clause contained.[19]

Thus the agreement between the Bricklayers and Muskegon, apart from its "self-help" features, was viewed as valid under the proviso, though it was applicable "irrespective of craft" and was conditioned on the "wages and working conditions . . . in the collective bargaining agreement between the equivalent . . . Local Union and its contracting employers."

19. This is made clear in the decision itself and, particularly footnote 13, where the Board rejected the General Counsel's contention based on *Colson and Stevens,* 137 NLRB 1650. The Board, citing *Centlivre,* noted that it had:

> "recently reversed *Colson and Stevens* and now holds that picketing to obtain a contract clause which is within the construction industry proviso to Section 8(e) does not violate Section 8(b)(4)(A).

Then in *Carvel*, 152 NLRB 1672, the Board considered the validity of the following clause:

> "The Employer [Carvel] agrees that no journeyman or apprentice who is a member of Local 217 . . . will be assigned to work or expected to work or required to work, on any job or project *on which a worker or person, is performing any work within the jurisdiction of Local No. 217*, if said worker or person is performing such work for wages, hours or under any *conditions* of employment, which are different from those established by this agreement." (Emphasis supplied.)

While again finding, as in *Muskegon*, that the clause was unprivileged because of its "self enforcement provisions", the Board clearly viewed the clause as otherwise within the construction industry exemption. The Board specifically rejected the contention there made that the proviso was inapplicable because the contract provision did not refer to the "contracting out" or "subcontracting" of unit work and affected persons and employers with whom Carvel had no contractual relationship.[20] The Board stated:

> ". . . the application of the proviso does not, in our view, depend on the precise relationship between Carvel with whom the Union has a contract and other employers and persons on the job, in this instance the general contractor and Ballard, who may be affected by the enforcement of the contractual proviso. The language of the proviso itself does not limit its applicability to the 'contracting out' or 'subcontracting' of work by the employer with whom a union has an agreement within the scope of Section 8(e). Indeed, were the proviso given such a limited applicability, it would be of little effect, for aside from the general contractor on a job, the various firms involved normally have control only of 'unit' work—that is, the particular work for which they hold a subcontract. Restrictions on the right to subcontract such work could well be primary, and thus lawful without reference to the construction industry proviso, because they are wholly outside the scope of 8(e)." (At p. 1676.)

20. At p. 1677 and fn. 8.

The Board decision in *Ets-Hokin*, 154 NLRB 839, followed as recently as *Baltimore Contractors*, 190 NLRB 415, also reflect the breadth given to the construction industry proviso except where "self-help" provisions are included in the agreement. In *Ets-Hokin*, the clause at issue provided:

> "The Local Unions are part of the International Brotherhood of Electrical Workers and any violation or annulment of working rules or agreements of *any other Local Union of the IBEW*, or the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm or corporation not recognizing the IBEW as the collective-bargaining representative *on any electrical work in the jurisdiction of this or any other such Local Union by the Employer*, will be sufficient cause for the cancellation of this agreement, after the facts have been determined by the International Office of the Union.

The Board in *Ets-Hokin* and in subsequent cases collected in *Baltimore Contractors, supra*, treated such a clause as within the construction industry proviso.

Thus, the Board decisions since *Centlivre* have either held or viewed the construction industry proviso as privileging what may be characterized as *Denver Building* on-site agreements despite the absence of the factors which the Charging Parties here contend are required conditions of proviso exemption, where the facts were not at odds with those of the Charging Parties' cases. And the full scope given to the proviso in such decisions points directly away from the Charging Parties' contentions.

And if, as the Board has held in cases discussed above, the exemption applies where the "agreeing" employer has no employees of the kind or craft involved,[20a] there is no reason to

20a. As a matter of fact the Board has held, with court approval, that a "person" can violate 8(e) by entering into a proscribed agreement with a labor organization *International Association of Machinists & Aerospace Workers, AFL-CIO (Lufthansa German Airlines)*, 197 NLRB No. 18, enfd. 85 LRRM 2257 (C.A. 9 January 9, 1974). Thus, if a person who employs no one can violate 8(e) it would be

attach significance to whether the agreement is in a "collective-bargaining contract" or whether there is a "collective-bargaining relationship" between the union and employer (for instance, the general contractor) party to the agreement. Since any such "collective bargaining contract" would not fix general terms and conditions of employment for any of the employer's own employees, no independent significance appears with respect to this contention of the Charging Parties.

The Court decision in *Connell, supra,* involving issues under the anti-trust laws, has also been carefully and fully considered in light of the foregoing discussion based on cases arising under the Act itself. With the fullest respect to the Court, we see no basis for relying on the dictum of the majority view and the discussion in the minority opinion of *Connell* which would warrant rejection of the foregoing discussion and analysis. Thus the Court in *Connell* was apparently of the view that the absence of a "collective bargaining relationship" would preclude a finding that the construction industry exemption to Section 8(e) might operate. And the Court apparently believed that this question has not been considered by the Board and Courts.

But these arguments[21] (the absence of a representable class of employees and its variant—the absence of a collective-bargaining relationship) are essentially indistinguishable from those rejected by the Board and Courts in the past. Thus, in addition to the above discussion, it should be noted that the absence of an employment relationship theory was directly

axiomatic that such a person could enter into a privileged 8(e) proviso agreement absent a showing that Congress intended the proviso to be narrower in coverage than the prohibition to which it is an exception.

21. The Charging Parties here argue that the fundamental representation concepts and policies reflected in Section 9(a) and 8(b)(7), when read in conjunction with the exception expressly created in 8(f), are undermined by permitting picketing for subcontracting agreements of employers who do not employ workers in the craft represented by such unions. See footnote 6 above and the discussion below concerning the "equities" position in the dissenting opinion of *Connell.*

before the Court in *San Bernadino.*[22] There, in supporting its argument that the agreement sought had an unlawful secondary effect, the Board offered the following analysis:

> "In the context presented in this case, where the subcontractor clause is sought to be imposed upon a general contractor for whom subcontracting is the normal mode of carrying on his enterprise . . . the terms of Article I-F and its uniform interpretation by the Union show [that] the clause amounts to a commitment by the signatory employer to use only AFL-CIO subcontractors, and, accordingly, to boycott another employer for reasons not strictly germane to the economic integrity of the principal work unit.
>
> "Indeed, Article I-F limits the category of permitted subcontractors *even in those crafts which, by hypothesis, the signatory employer does not himself employ.* The record contains no evidence as to the number of [the prime contractor's] employees, if any, nor as to their craft or trade. But it is improbable that . . . a small contractor, actually hires members of the entire range of trades represented in home construction; even the largest general contractors tend to employ only presons in the basic trades, subcontracting the specialty work. Article I-F, however, makes no distinction according to whether or not a subcontractor could be 'competing' with the signatory employer's own employees. Thereby it reveals its purpose to cause a boycott of 'nonunion' (i.e., non-AFL-CIO subcontractors." (Board brief in *San Bernadino,* pp. 41, 42, citations omitted. Emphasis supplied.)

The D. C. Circuit Court was not persuaded, rejecting, *sub silento,* the absence of a "collective-bargaining relationship" between the picketing Council and picketed employer as a basis for finding subcontracting agreements unprotected by the building and construction proviso to 8(e).

And in *Colson and Stevens,*[23] in the Ninth Circuit Court of

22. *Building and Construction Trades Council of San Bernadino and Riverside Counties, et al.* v. *N.L.R.B.,* 328 F.2d 540 (D.C. C.A., 1964).

23. *Construction Production & Maintenance Laborers Union, Local 383, AFL-CIO and United Brotherhood of Carpenters and*

Appeals, the Board relied upon the context of requirements under Section 8(b)(3) and 8(d) of the Act. Thus, in describing the "secondary subcontractor clause" in issue, the Board briefly characterized it as a "regulation of third party relationship extrinsic to the employment relationship" and therefore as involving a non-mandatory bargaining subject which the unions could not strike to obtain (Board's brief at p. 26).

With respect to the dissenting opinion in *Connell*, Judge Clark presented two approaches to the Section 8(e) on-site proviso, one based on equitable considerations and the other based on his view of the legislative history.

The legislative history of the construction industry proviso and its interpretation in cases arising under the Act is dealt with at length earlier. It is not repeated here. As for the dissenting Judge's views concerning "one shot" agreements and the pattern of bargaining in the construction industry prior to enactment of the 1959 amendments to the Act, the Board's brief in *Colson and Stevens, supra*, is enlightening. There, in discussing the construction industry practice legitimized by the proviso, the brief states:

> "As was pointed out in a 1950 study of building trades bargaining in the 12 counties of southern California, where a master agreement establishing basic employment standards has been in effect since 1941 in which 19 building trades unions participate together with the 10 building trades councils and the major contractors' associations, 'for the well-established employers, it is also important to have a floor under competitive labor costs.' The structure of the industry, with subcontracting a customary way of doing business, leads employers to favor subcontracting clauses as a means of undergirding such a 'floor.' The Southern California master labor agreement referred to above contains such a clause, similar to the clause that the petitioner Unions sought to force upon Colson, as a result of which 'any subcontractor [of a signatory con-

Joiners of America, Local 1089, AFL-CIO v. *N.L.R.B., (Colson and Stevens Construction Co.)*, 323 F.2d 422 (C.A. 9, 1963).

> tractor] who attempts to depart from the established union standards' faces cancellation of his contracts and an immediate loss of business.' On the other hand, if the contractor is unwilling in [these] circumstances to cancel the contract, or if he lets a subcontract to one who refuses to become bound by the master labor agreement, then the signatory contractor faces suit by the unions for specific performances with an interruption of work on his project occasioned by a change of subcontractors, and perhaps a damage suit by the ousted subcontractor. The bargaining pattern, with these effects, Congress believed legitimate and left lawful. . . ." (Board's *Colson and Stevens* brief, pp. 19-21.)

This is particularly significant when it is realized that organizing in the building and construction industry both prior to and subsequent to the 1959 amendments, was and is primarily carried on by building and construction trades councils on behalf of their constituent craft locals. The building trades agreements proffered are not conventional collective-bargaining agreements, nor is a conventional collective-bargaining relationship sought, but rather an attempt is made to obtain skeleton agreements[24] (containing little more than subcontracting provisions) which in turn are augmented by the execution of collective-bargaining agreements by the individual trade unions, the latter agreements containing provisions governing wages and other substantive conditions of employment. As the Court observed in *Dallas Building and Construction Trades Council* v. *N.L.R.B.*, 396 F. 2d 677 (C.A. D.C.), at p. 682:

> ". . . Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry; and in 1959 'umbrella' agreements like the one proposed here were, as they are today, commonplace, for collective-bargaining is traditionally conducted at several levels in the construction industry. . . ."

24. The text of a typical building and construction trades council agreement is set forth in detail in *Dallas Building and Construction Trades Council*, 164 NLRB 939, fn. 2 at p. 940.

Under this arrangement the building and trades council is as much as a "stranger" to the general contractor and his employees, if any, as the Plumbers Union was to Connell. The subcontracting clause encased in such a trades council "shell" agreement can no more be said to be obtained in the context of a collective-bargaining relationship than the proviso agreement sought or obtained in such cases as *Colson and Stevens, supra, Centlivre, supra,* and *Church's Fried Chicken, supra.*

As for the "equities" raised in the dissenting opinion, they have been substantially dealt with by the Board and Courts in cases under Section 8(b)(7) of the Act. Thus, the Board and Court in *Dallas General, supra,* have pointed out the absence of any inconsistency between the Board's interpretation of Section 8(b)(4) and the purposes of Section 8(e). The Court in *Dallas General* pointed out that "Sections 8(b)(7) and 8(e) are aimed at wholly different problems." Thus, the cases make clear that while considerations involving Section 9(a) selection of a bargaining representative may be directly related to Section 8(b)(7) of the Act,[25] such considerations are unrelated to "secondary" agreement issues under Section 8(e).

In view of all the foregoing, including Supreme Court and Circuit Court decisions, relevant legislative history and the Board's post-*Centlivre* decision, we find the contentions of the Charging Parties to provide no basis to establish under current Board law, violations of either Section 8(e) or 8(b)(4)(A) of the Act.

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25. See, e.g., in addition to *Dallas General, supra, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council, AFL-CIO,* 168 NLRB 538, enf. 415 F.2d 656 (C.A. 9); *Los Angeles Building and Construction Trades Council, et al. (Lively Construction Co.),* 170 NLRB 1499; *Church's Fried Chicken, supra;* and *Construction Trades Council of Philadelphia and Vicinity (Samuel E. Long, Inc.),* 201 NLRB No. 42, enfd. 485 F.2d 680 (C.A. 3, 1973).